(4)

Supreme Court, U.S.
FILED
NOV 15 2005
OFFICE OF THE CLERK

NO. 05-346
IN THE SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; JOSEPH MAZURKIEWICZ, Superintendent of State Correctional Institution at Rockview; GERALD J. PAPPERT, Attorney General of Pennsylvania,
Petitioners,

v.

ANTUAN BRONSHTEIN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

LOUIS M. NATALI, JR., ESQ.
TURNER & MCDONALD
1725 Spruce Street
Philadelphia, Pennsylvania 19103
215-546-9700
Counsel for Respondent, Antuan Bronshtein

Dated: November 15, 2005

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant certiorari to review the unanimous decision of the Third Circuit where that decision applies this Court's settled law to the facts of the case; where the Third Circuit's decision concerns an area of law – the adequacy and independence *vel non* of a state court procedural default ruling – that this Court traditionally leaves to the lower federal courts because of their greater familiarity with state law; where the Third Circuit's ruling arose from an unusual situation when the Pennsylvania Supreme Court for twenty years applied a no-procedural-default approach in capital cases then, without warning and without allowing a grace period, switched to an approach in which procedural bars are strictly enforced; where the Third Circuit's ruling in this case is in accord with the rulings of at least twenty-five Third Circuit and District Court judges who have considered the issue; and where even Justices of the Pennsylvania Supreme Court have recognized the unfairness of the state court's sudden about-face on procedural default issues and the appropriateness of the Third Circuit's finding of no adequate state procedural ground in this case?

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

A. The Pennsylvania Supreme Court's Capital Case Relaxed Waiver Rule 1

1. The Pennsylvania Supreme Court 1

2. The Third Circuit 6

3. District Courts in Pennsylvania 7

4. The Commonwealth's representations 8

B. The PCRA "Time-Bar." 9

C. Mr. Bronshtein's Case 11

1. State Court 11

2. District Court 15

3. Third Circuit 18

REASONS FOR DENYING THE WRIT 22

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Adams v. Kyler, 2005 WL 1041191 (E.D. Pa. May 2, 2005) 28

Albrecht v. Horn, 314 F.Supp.2d 451 (E.D. Pa. 2004) 8

Bailey v. Delaware, 68 F.3d 736 (3d Cir. 1995)..... 28, 29

Baker v. Horn, 383 F.Supp.2d 720 (E.D. Pa. 2005) 8

Banks v. Horn, 126 F.3d 206 (3d Cir. 1997) 7, 15

Barr v. City of Columbia, 378 U.S. 146 (1964) 18

Bass v. Chesney, 2005 WL 1941661 (E.D. Pa. Aug. 10, 2005) 28

Benshunas v. Klem, 137 Fed.Appx. 510 (3d Cir. 2005) 27

Booker v. Folino, 2005 WL 638051 (E.D. Pa. March 17, 2005) 28

Brecht v. Abrahamson, 507 U.S. 619 (1993) 21

Brodeur v. Patrick, 2005 WL 1126947 (E.D. Pa. May 11, 2005) 28

Brown v. Sobina, 2005 WL 139086 (E.D. Pa. Jan. 21, 2005) 28

Bryant v. Folino, 2005 WL 664037 (E.D. Pa. March 21, 2005) 28

Buck v. Colleran, 115 Fed.Appx. 526 (3d Cir. 2004) 27

Buehl v. Vaughn, 166 F.3d 163 (3d Cir. 1999) 27

Butner v. United States, 440 U.S. 48 (1979) 23

Cabrera v. Barbo, 175 F.3d 307 (3d Cir. 1999) 18

Caldwell v. Mississippi, 472 U.S. 320 (1985) 26

Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002) 6, 27

Christy v. Horn, 115 F.3d 201 (3d Cir. 1997) 27

Clymer v. Combine, 2005 WL 711651 (E.D. Pa. March 29, 2005) 28

Coleman v. Thompson, 501 U.S. 722 (1991) 15, 18

County Court of Ulster Cty. v. Allen, 442 U.S. 140 (1979) 23

Cristin v. Brennan, 281 F.3d 404 (3d Cir. 2002) 27

Cullison v. Wolfe, 2005 WL 2644997 (E.D. Pa. Oct. 13, 2005) 27

D'Agostino v. Tennis, 2005 WL 568042 (E.D. Pa. March 8, 2005) 28

Deputy v. Taylor, 19 F.3d 1485 (3d Cir. 1994) 28, 29

Dugger v. Adams, 489 U.S. 401 (1989) 15, 16

Elam v. Gillis, 2005 WL 555383 (E.D. Pa. March 7, 2005) 28

English v. Vaughn, 2005 WL 1677967 (E.D. Pa. July 15, 2005) 28

Fahy v. Horn, 240 F.3d 239 (3d Cir. 2001) 7

Fahy v. Horn, 2003 WL 22017231 (E.D. Pa. Aug. 26, 2003) 8

Faulcon v. Palakovich, 2005 WL 1958071 (E.D. Pa. Aug. 11, 2005) 28

Flamer v. Delaware, 68 F.3d 710 (3d Cir. 1995) 28

Flecha v. Shannon, 2005 WL 851066 (E.D. Pa. April 12, 2005) 28

Ford v. Georgia, 498 U.S. 411 (1991) 15, 18

Ford v. Wainwright, 477 U.S. 399 (1986) 12

Fountain v. Kyler, 420 F.3d 267, 272 (3d Cir. 2005) 27

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 15

Frey v. Fulcomer, 974 F.2d 348 (3rd Cir. 1992) 27

Gattis v. Snyder, 278 F.3d 222 (3d Cir. 2002) 28, 29

Granberry v. Greer, 481 U.S. 129 (1987) 23

Green v. Rozum, 2005 WL 83258 (E.D. Pa. Jan. 13, 2005) 28

Green v. Rozum, 2005 WL 1279136 (E.D. Pa. May 25, 2005) 28

Guy v. Moore, 2005 WL 2104316 (E.D. Pa. Aug. 29, 2005) 28

Hackett v. Price, 381 F.3d 281 (3d Cir. 2004) 26

Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000) 28

Harper v. Kyler, 2005 WL 950617 (E.D. Pa. April 22, 2005) 28

Harris v. Reed, 489 U.S. 255 (1989) 25

Hathorn v. Lovorn, 457 U.S. 255 (1982) 15

Holiday v. Varner, 2005 WL 119572 (E.D. Pa. Jan. 19, 2005) 28

Imes v. Patrick, 2005 WL 1563351 (E.D. Pa. June 29, 2005) 28

Jacobs v. Horn, 129 F.Supp.2d 390 (M.D. Pa. 2001), aff'd in relevant part, 395 F.3d 92, 117 (3d Cir. 2005) 6, 8

Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001) 7

Johnson v. DiGuglielmo, 2005 WL 2585448 (E.D. Pa. Oct. 7, 2005) 27

Johnson v. Kelcher, 2005 WL 2371994 (E.D. Pa. Sept. 26, 2005) 27-28

Johnson v. Mississippi, 486 U.S. 578 (1988) 15

Johnson v. Superintendent, 2005 WL 856888 (E.D. Pa. April 13, 2005) 28

Keller v. Larkins, 251 F.3d 408 (3d Cir. 2001) 27

Laird v. Horn, 159 F.Supp.2d 58 (E.D. Pa. 2001), aff'd, 414 F.3d 419, 425 (3d Cir. 2005) 7, 8

Lambert v. Blackwell, 134 F.3d 506 (3d Cir.1998) 7

Lambrix v. Singletary, 520 U.S. 518 (1997) 15, 23

Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989) 27

Leyva v. Williams, 2005 WL 746042 (E.D. Pa. March 30, 2005) 28

Lines v. Larkins, 208 F.3d 153 (3d Cir. 2000) 27

Lloyd v. Shannon, 2005 WL 1138389 (M.D. Pa. April 28, 2005) 28

Lutz v. Brennan, 67 Fed.Appx. 151 (3d Cir. 2003) 27

Marra v. Larkins, 46 Fed.Appx. 83 (3d Cir. 2002) 27

Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003) 28

Mattis v. Vaughn, 80 Fed.Appx. 154 (3d Cir. 2003) 27

McCandless v. Vaughn, 172 F.3d 255 (3d Cir. 1999) 27

Miles v. DiGuglielmo, 2005 WL 2139952 (E.D. Pa. Sept. 1, 2005) 28

Miles v. DiGuglielmo, 2005 WL 396603 (E.D. Pa. Feb. 17, 2005) 28

Morris v. Horn, 187 F.3d 333 (3d Cir. 1999) 27

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 18

Ocasio v. Varner, 2005 WL 856897 (E.D. Pa. April 12, 2005) 28

Perez v. Sobina, 2005 WL 711653 (E.D. Pa. March 29, 2005) 28

Person v. Wynder, 2005 WL 2346117 (E.D. Pa. Sept. 23, 2005) 28

Prunty v. Klem, 2005 WL 281182 (E.D. Pa. Feb. 3, 2005) 28

Purnell v. Shannon, 2005 WL 825902 (E.D. Pa. April 7, 2005) 28

Pursell v. Horn, 187 F.Supp.2d 260 (W.D. Pa. 2002) 7

Richardson v. Warden, 125 Fed.Appx. 395 (3d Cir. 2005) 27

Rienzi v. Gillis, 2005 WL 645925 (E.D. Pa. March 16, 2005) 28

Riley v. Lavan, 2005 WL 1995462 (E.D. Pa. Aug. 16, 2005) 28

Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001) 29

Rill v. Meyers, 87 Fed.Appx. 822 (3d Cir. 2004) 27

Rinaldi v. Gillis, 2005 WL 701710 (E.D. Pa. March 28, 2005) 28

Robichaw v. Mechling, 2005 WL 331496 (E.D. Pa. Feb. 10, 2005) 28

Rollins v. Horn, 2005 WL 1806504 (E.D. Pa. July 26, 2005) 7-8

Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004), subsequent history, 125 S. Ct. 2456 (2005) 26, 27

Rorie v. Beard, 2005 WL 825917 (E.D. Pa. April 7, 2005) 28

Rummel v. Estelle, 445 U.S. 263 (1980) 23

Saintville v. Colleran, 2005 WL 2106177 (M.D. Pa. Aug. 31, 2005) 28

Sanchez v. Tennis, 2005 WL 645926 (E.D. Pa. March 17, 2005) 28

Schwartz v. Colleran, 2005 WL 1389235 (E.D. Pa. June 9, 2005) 28

Selvage v. Collins, 494 U.S. 108 (1990) 23

Shackelford v. Stickman, 2005 WL 289935 (E.D. Pa. Feb. 4, 2005) 28

Simmons v. South Carolina, 512 U.S. 154 (1994) 1, 18, 22

Sims v. Patrick, 2005 WL 1025150 (E.D. Pa. April 29, 2005) 28

Sistrunk v. Vaughn, 96 F.3d 666 (3d Cir. 1996) 27

Smith v. Sobina, 2005 WL 281201 (E.D. Pa. Feb. 4, 2005) 28

Steckel v. Carroll, 2004 WL 825302 (D. Del. Apr. 13, 2004) 28

Sweger v. Chesney, 294 F.3d 506 (3d Cir. 2002) 27

Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001) 6-7, 19, 27

Terry v. Petsock, 974 F.2d 372 (3d Cir. 1992) 27

Thomas v. Beard, 2005 WL 2373930 (E.D. Pa. Aug. 19, 2005) 7

Tillery v. Horn, 142 Fed.Appx. 66 (3d Cir. 2005) 27

Trest v. Cain, 522 U.S. 87 (1997) 26

Turner v. DiGuglielmo, 2005 WL 2250692 (W.D. Pa. Aug. 29, 2005) 28

Turner v. Shannon, 2005 WL 1655881 (E.D. Pa. July 12, 2005) 28

Tyler v. DiGuglielmo, 2005 WL 477997 (E.D. Pa. Feb. 28, 2005) 28

Wainwright v. Sykes, 433 U.S. 72 (1977) 15

Wallace v. Price, 2002 WL 31180963 (W.D. Pa. Oct. 1, 2002), adopted as modified on other grounds, 2003 WL 21295982 (W.D. Pa. Mar. 31, 2003) 8

Weaver v. Frank, 36 Fed.Appx. 693 (3d Cir. 2002) 27

Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000) 28

Wenger v. Frank, 266 F.3d 218 (3d Cir. 2001) 27

Werts v. Vaughn, 228 F.3d 178 (3d Cir. 2000) 27

White v. Horn, 191 F.3d 446 (3d Cir. 1999) 27

Whitney v. Horn, 280 F.3d 240 (3d Cir. 2002) 26, 27

Williams v. Price, 343 F.3d 223 (3d Cir. 2003) 27

Willis v. Vaughn, 48 Fed.Appx. 402 (3d Cir. 2002) 27

Wishnefsky v. Meyers, 2005 WL 1498502 (M.D. Pa. June 22, 2005) 28

Witherspoon v. Illinois, 391 U.S. 510 (1968) 3

Wyatt v. DiGuglielmo, 2005 WL 1114350 (E.D. Pa. May 10, 2005) 28

Yarris v. Horn, 230 F.Supp.2d 577 (E.D. Pa. 2002) 8

In re Zettlemoyer, 53 F.3d 24 (3d Cir. 1995) 27

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991) 27

STATE CASES

Commonwealth v. Abu-Jamal, 555 A.2d 846 (Pa. 1989) 2

Commonwealth v. Abu-Jamal, 720 A.2d 79 (Pa. 1998) 2

Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998) 4, 5, 10, 19, 20

Commonwealth v. Baker, 511 A.2d 777 (Pa. 1986) 2

Commonwealth v. Banks, 656 A.2d 467 (Pa. 1995) 2

Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) 10, 20

Commonwealth v. Beck, 560 A.2d 1370 (Pa. 1989) 2

Commonwealth v. Billa, 555 A.2d 835 (Pa. 1989) 3

Commonwealth v. Breakiron, 729 A.2d 1088 (Pa. 1999) 5

Commonwealth v. Brown, 711 A.2d 444 (Pa. 1998) 2

Commonwealth v. Brown, 872 A.2d 1139 (Pa. 2005) 5, 6, 24

Commonwealth v. Carpenter, 515 A.2d 531 (Pa. 1986) 3

Commonwealth v. Carpenter, 725 A.2d 154 (Pa. 1999) 6

Commonwealth v. Chester, 587 A.2d 1367 (Pa. 1991) 2

Commonwealth v. Chester, 733 A.2d 1242 (Pa. 1999) 5

Commonwealth v. Christy, 656 A.2d 877 (Pa. 1995) 2

Commonwealth v. Clark, 710 A.2d 31 (Pa. 1998) 3

Commonwealth v. Cook, 676 A.2d 639 (Pa. 1996) 3

Commonwealth v. Crews, 863 A.2d 498 (Pa. 2004) 5, 24

Commonwealth v. Crispell, 608 A.2d 18 (Pa. 1992) 3

Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999) 10

Commonwealth v. DeHart, 650 A.2d 38 (Pa. 1994) 3

Commonwealth v. Elliott, 700 A.2d 1243 (Pa. 1997) 3

Commonwealth v. Ford, 809 A.2d 325 (Pa. 2002) 6, 24, 25

Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003) 5

Commonwealth v. Frey, 475 A.2d 700 (Pa. 1984) 2

Commonwealth v. Gibson, 688 A.2d 1152 (Pa. 1997) 3

Commonwealth v. Gibson, 720 A.2d 473 (Pa. 1998) 3

Commonwealth v. Gribble, 703 A.2d 426 (Pa. 1997) 3

Commonwealth v. Gribble, 863 A.2d 455 (Pa. 2004) 5

Commonwealth v. Hall, 701 A.2d 190 (Pa. 1997) 3

Commonwealth v. Hall, 872 A.2d 1177 (Pa. 2005) 6

Commonwealth v. Harris, 703 A.2d 441 (Pa. 1997) 3

Commonwealth v. Harris, 852 A.2d 1168 (Pa. 2004) 5

Commonwealth v. Hawkins, 787 A.2d 292 (Pa. 2001) 5

Commonwealth v. Hill, 666 A.2d 642 (Pa. 1995) 2

Commonwealth v. Holcomb, 498 A.2d 833 (Pa. 1985) 3

Commonwealth v. Hughes, 865 A.2d 761 (Pa. 2005) 5

Commonwealth v. Jacobs, 727 A.2d 545 (Pa. 1999) 5

Commonwealth v. Jasper, 610 A.2d 949 (Pa. 1992) 4

Commonwealth v. Jermyn, 709 A.2d 849 (Pa. 1998) 2

Commonwealth v. Johnson, 668 A.2d 97 (Pa. 1995) 3

Commonwealth v. Johnson, 815 A.2d 563 (Pa. 2002) 6

Commonwealth v. Jones, 876 A.2d 380 (Pa. 2005) 6

Commonwealth v. LaCava, 666 A.2d 221 (Pa. 1995) 3

Commonwealth v. Laird, 726 A.2d 346 (Pa. 1999) 5

Commonwealth v. Lesko, 501 A.2d 200 (Pa. 1985) 3

Commonwealth v. Lewis, 567 A.2d 1376 (Pa. 1989) 4

Commonwealth v. Marinelli, 690 A.2d 203 (Pa. 1997) 3

Commonwealth v. Marrero, 748 A.2d 202 (Pa. 2000) 6

Commonwealth v. Marshall, 810 A.2d 1211 (Pa. 2002) 5

Commonwealth v. May, 656 A.2d 1335 (Pa. 1995) 3

Commonwealth v. McKenna, 383 A.2d 174 (Pa. 1978) 1, 2, 19

Commonwealth v. Michael, 755 A.2d 1274 (Pa. 2001) 26

Commonwealth v. Miles, 681 A.2d 1295 (Pa. 1996) 3

Commonwealth v. Miller, 664 A.2d 1310 (Pa. 1995) 3

Commonwealth v. Morales, 701 A.2d 516 (Pa. 1997) 2

Commonwealth v. Morris, 684 A.2d 1037 (Pa. 1996) 2

Commonwealth v. Nelson, 523 A.2d 728 (Pa. 1986) 2

Commonwealth v. Paolello, 665 A.2d 439 (Pa. 1995) 3

Commonwealth v. Peterkin, 513 A.2d 373 (Pa. 1986) 4

Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998) 10, 20

Commonwealth v. Pirela, 507 A.2d 23 (Pa. 1986) 2

Commonwealth v. Pirela, 726 A.2d 1026 (Pa. 1999) 5

Commonwealth v. Pursell, 724 A.2d 293 (Pa. 1999) 5

Commonwealth v. Reyes, 870 A.2d 888 (Pa. 2005) 5

Commonwealth v. Rush, 838 A.2d 651 (Pa. 2003) 5

Commonwealth v. Saranchak, 810 A.2d 1197 (Pa. 2002) 26

Commonwealth v. Simmons, 662 A.2d 621 (Pa. 1995) 2

Commonwealth v. Speight, 677 A.2d 317 (Pa. 1996) 3

Commonwealth v. Spotz, 716 A.2d 580 (Pa. 1998) 2

Commonwealth v. Stoyko, 475 A.2d 714 (Pa. 1984) 3

Commonwealth v. Szuchon, 484 A.2d 1365 (Pa. 1984) 3-4

Commonwealth v. Szuchon, 693 A.2d 959 (Pa. 1997) 2

Commonwealth v. Travaglia, 661 A.2d 352 (Pa. 1995) 2

Commonwealth v. Walker, 656 A.2d 90 (Pa. 1995) 3

Commonwealth v. Wallace, 724 A.2d 916 (Pa. 1999) 6

Commonwealth v. Washington, 692 A.2d 1024 (Pa. 1997) 3

Commonwealth v. Wayne, 720 A.2d 456 (Pa. 1998) 3

Commonwealth v. Wharton, 665 A.2d 458 (Pa. 1995) 2

Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002) 6, 24

Commonwealth v. Williams, 640 A.2d 1251 (Pa. 1994) 2

Commonwealth v. Williams, 720 A.2d 679 (Pa. 1998) 3

Commonwealth v. Williams, 732 A.2d 1167 (Pa. 1999) 5

Commonwealth v. Williams, 782 A.2d 517 (Pa. 2001) 5

Commonwealth v. Wilson, 861 A.2d 919 (Pa. 2004) 5

Commonwealth v. Yarris, 549 A.2d 513 (Pa. 1988) 3

Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999) 6

Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa. 1982) 3

State v. Wessinger, 736 So. 2d 162 (La. 1999) 21

STATE STATUTES

42 Pa. Cons. Stat. Ann. § 9545(b) 9, 19

42 Pa. Cons. Stat. Ann. § 9545(b)(1) 14, 16

COUNTER-STATEMENT OF THE CASE[1]

The Commonwealth asks this Court to grant certiorari and review the unanimous decision of the Third Circuit panel in Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005). The Third Circuit panel was comprised of Judge Alito, who authored the opinion, and Judges Barry and Stapleton. The panel affirmed the District Court's grant of habeas relief from the death sentence under Simmons v. South Carolina, 512 U.S. 154 (1994), because the prosecution put Petitioner's future dangerousness at issue but the jury was never informed that there is no parole from a life sentence for first-degree murder in Pennnsylvania.[2]

The Commonwealth does not challenge the propriety of the Third Circuit's ruling on the constitutional error. Rather, the Commonwealth's certiorari argument raises only a procedural contention. As will be shown, the Commonwealth's contention lacks merit and is inconsistent with the rulings of every Third Circuit panel that has addressed the issue, District Court Judges who have addressed the issue, and decisions of the Pennsylvania Supreme Court relating to the issue. Certiorari should be denied.

A. The Pennsylvania Supreme Court's Capital Case Relaxed Waiver Rule

Because the Commonwealth's argument rests upon its claims about the Pennsylvania Supreme Court's capital case "relaxed waiver" rule, we begin by describing that rule as set forth in: (1) the Pennsylvania Supreme Court's caselaw; (2) the Third Circuit's decisions; (3) the decisions of District Courts in Pennsylvania; and (4) the Commonwealth's own briefs in capital cases.

1. **The Pennsylvania Supreme Court** first articulated its capital case relaxed waiver rule in Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978), which proclaimed that an "overwhelming public interest" in preventing unconstitutional executions precluded application of

---

[1]The Petition for Writ of Certiorari is cited as "*Petition*." Petitioners are referred to as "the Commonwealth." Emphasis is supplied unless otherwise indicated. Parallel citations are omitted.

[2]Pennsylvania is the only state with a life-without-parole alternative to death where this information routinely is withheld from capital sentencing juries.

procedural bar rules in capital cases. Id. at 181. Because procedural bar rules "cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen" – the Pennsylvania Supreme Court declared its "duty to transcend procedural rules" in capital cases, and to address procedurally barred claims on their merits. Id. at 180-81.

After McKenna, and until late 1998, see infra, the Pennsylvania Supreme Court repeatedly applied this capital case relaxed waiver rule, held that *procedural bars would not be applied in Pennsylvania capital cases*, and reviewed claims that otherwise were "procedurally barred."[3] The

---

[3]During this period there are at least fifty reported Pennsylvania Supreme Court opinions applying the relaxed waiver rule, often to more than one claim. See, e.g., Commonwealth v. Morales, 701 A.2d 516, 520 n.13 (Pa. 1997) ("this Court's practice has been to address all waived issues which have been raised in PCRA death penalty petitions"; granting relief on improper prosecutorial argument claim first raised in second PCRA petition); Commonwealth v. Abu-Jamal, 720 A.2d 79, 88 n.9 (Pa. 1998) (noting "this court's tradition of entertaining all claims raised in a capital case, whether on direct appeal or collateral attack, irrespective of waiver"); Commonwealth v. Jermyn, 709 A.2d 849, 856 n.20 (Pa. 1998) ("this court has addressed all issues arising in a death penalty case, irrespective of a finding of waiver"); Commonwealth v. Banks, 656 A.2d 467, 470 n.7 (Pa. 1995) (although claims were "waived under the PCRA, we will nevertheless address all of Appellant's claims since ... it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver"); Commonwealth v. Morris, 684 A.2d 1037, 1042 n.11 (Pa. 1996) (same); Commonwealth v. Travaglia, 661 A.2d 352, 356 n.6 (Pa. 1995) ("it is this Court's practice to address all issues arising in a death penalty case, irrespective of a finding of waiver"; addressing merits of issues raised in second PCRA petition); Commonwealth v. Szuchon, 693 A.2d 959, 962-64 (Pa. 1997) (addressing merits of issues first raised in third post-conviction petition); Commonwealth v. Christy, 656 A.2d 877, 881 n.2, 885 n.14, 886 n.15 (Pa. 1995) (death penalty is "extraordinary circumstance" that trumps PCRA waiver rules); Commonwealth v. Beck, 560 A.2d 1370, 1374 (Pa. 1989) ("We ... relax the rule of waiver in capital punishment cases specifically in order to get to the truth."); Commonwealth v. Brown, 711 A.2d 444, 455-56 (Pa. 1998) ("This Court generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty."); Commonwealth v. Spotz, 716 A.2d 580, 585 n.5, 591 (Pa. 1998) (reviewing waived claim on merits because of "our practice to relax waiver rules in capital cases"); Commonwealth v. Wharton, 665 A.2d 458, 462 (Pa. 1995) (same); Commonwealth v. Hill, 666 A.2d 642, 648 (Pa. 1995) (same); Commonwealth v. Williams, 640 A.2d 1251, 1261 (Pa. 1994) (same); Commonwealth v. Chester, 587 A.2d 1367, 1382 n.9 (Pa. 1991) (same); Commonwealth v. Nelson, 523 A.2d 728, 736 (Pa. 1986) (same); Commonwealth v. Pirela, 507 A.2d 23, 27 n.2 (Pa. 1986) (same); Commonwealth v. Frey, 475 A.2d 700, 707 n.4 (Pa. 1984) (same); Commonwealth v. Simmons, 662 A.2d 621, 636 (Pa. 1995) (same); Commonwealth v. Abu-Jamal, 555 A.2d 846, 854 (Pa. 1989) (same); Commonwealth v. Baker, 511 A.2d 777, 790 n.10 (Pa. 1986) (same);

relaxed waiver rule was applied to all types of claims (with one possible exception, described below), and was applied whether the procedural bar arose from a violation of rules of appellate procedure, like the bar against raising issues on appeal that were not preserved in the trial court, e.g., May; Crispell; Nelson, or from violation of the statutory procedural bar rules contained in the Post Conviction Relief Act ("PCRA"), the statutory mechanism for seeking state post-conviction relief in Pennsylvania, e.g., Szuchon (third PCRA petition); Morales (second PCRA petition); Jermyn (same); Travaglia (same); Banks (first PCRA petition); Abu-Jamal (same); Morris (same); DeHart (same); Christy (same); Lesko (same).

The only (possible) exception to the relaxed waiver rule was for claims under Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, i.e., that jurors were improperly excluded because of general objections to capital punishment. In Commonwealth v. Szuchon, 484 A.2d 1365, 1377-80

Commonwealth v. Walker, 656 A.2d 90, 98-99 (Pa. 1995) (same); Commonwealth v. Gibson, 688 A.2d 1152, 1160-63 nn.13, 15, 19, 23 (Pa. 1997) (same); Commonwealth v. Gibson, 720 A.2d 473, 481 n.2 (Pa. 1998) (same); Commonwealth v. Wayne, 720 A.2d 456, 469 n.13 (Pa. 1998) (same); Commonwealth v. Williams, 720 A.2d 679, 684 n.12 (Pa. 1998) (same); Commonwealth v. Clark, 710 A.2d 31, 40 (Pa. 1998) (same); Commonwealth v. Hall, 701 A.2d 190, 200, 202 n.14, 207 n.17 (Pa. 1997) (same); Commonwealth v. Washington, 692 A.2d 1024, 1030 n.11 (Pa. 1997) (same); Commonwealth v. Marinelli, 690 A.2d 203, 214 n.19 (Pa. 1997) (same); Commonwealth v. Gribble, 703 A.2d 426, 436-37 (Pa. 1997) (same); Commonwealth v. Elliott, 700 A.2d 1243, 1252 n.21 (Pa. 1997) (same); Commonwealth v. Speight, 677 A.2d 317, 326 n.15 (Pa. 1996) (same); Commonwealth v. Cook, 676 A.2d 639, 649 n.26 (Pa. 1996) (same); Commonwealth v. May, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995) (same); Commonwealth v. Miller, 664 A.2d 1310, 1320 n.17, 1322, 1323 n.22 (Pa. 1995) (same); Commonwealth v. Johnson, 668 A.2d 97, 102 n.12, 103 nn.14-15, 104 n.18, 106 n.20, 107 n.21 (Pa. 1995); Commonwealth v. DeHart, 650 A.2d 38, 48 (Pa. 1994) (same; granting relief on claim first raised on appeal from denial of post-conviction relief); Commonwealth v. Crispell, 608 A.2d 18, 22 n.1 (Pa. 1992) (same); Commonwealth v. Billa, 555 A.2d 835, 842 (Pa. 1989) (same); Commonwealth v. Harris, 703 A.2d 441, 445 n.5, 446 n.7, 9 (Pa. 1997) (same); Commonwealth v. Miles, 681 A.2d 1295, 1301 n.8 (Pa. 1996) (same); Commonwealth v. LaCava, 666 A.2d 221, 228 n.8 (Pa. 1995) (same); Commonwealth v. Paolello, 665 A.2d 439, 453 n.11 (Pa. 1995) (same); Commonwealth v. Yarris, 549 A.2d 513, 521 (Pa. 1988) (same); Commonwealth v. Carpenter, 515 A.2d 531, 536 n.4, 538 n.8 (Pa. 1986) (same); Commonwealth v. Holcomb, 498 A.2d 833, 837 n.6 (Pa. 1985) (same); Commonwealth v. Lesko, 501 A.2d 200, 207 (Pa. 1985) (addressing merits of waived claim first raised in post-conviction); Commonwealth v. Zettlemoyer, 454 A.2d 937, 942 n.3, 955 n.19 (Pa. 1982) (declining to allow waiver in capital cases because of "final and irrevocable nature of the death penalty" and "for the reasons stated in" McKenna); Commonwealth v. Stoyko, 475 A.2d 714, 720-21 (Pa. 1984) (same).

(Pa. 1984) and Commonwealth v. Peterkin, 513 A.2d 373, 378-79 (Pa. 1986), the Pennsylvania Supreme Court held that a Witherspoon claim was waived where trial counsel affirmatively stated that he had no objection to excluding each person.[4] In Commonwealth v. Lewis, 567 A.2d 1376 (Pa. 1989), the Pennsylvania Supreme Court explained that its allowance of waiver for Witherspoon claims under such circumstances was the *sole exception to the relaxed waiver rule*:

> [The Witherspoon claim was] waived by the defendant's approval of the jury and failure to preserve these claims of error at the trial court. Although *waiver of any claim in a capital case appears to be contradictory to the relaxed waiver rules* ..., the case law of this Commonwealth is clear. This Court has repeatedly held that *Witherspoon claims are waivable*. [citing Peterkin; Szuchon].

Lewis, 567 A.2d at 1381.[5]

On November 23, 1998, in Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), the Pennsylvania Supreme Court suddenly changed course. The Court began by reaffirming that, since McKenna, it had "been our practice to *decline to apply ordinary waiver rules in capital cases*." Albrecht, 720 A.2d at 700 (citing Morris, 684 A.2d at 1042 n.11; quotation marks omitted). The Court also confirmed that the relaxed waiver rule had been created and applied because of the "unique severity and finality of the death penalty," and "to prevent this court from being instrumental in an unconstitutional execution." Id. The Court complained, however, that the relaxed waiver "doctrine has, in effect, virtually eliminated any semblance of finality in capital cases"; stated that the "benefits of relaxed waiver at the PCRA appellate stage are more than outweighed by the need for finality and efficient use of the resources of this court"; and announced that it would "*no longer*

---

[4]See also Peterkin, 513 A.2d at 389 (Nix, C.J., concurring) ("I am also concerned with the majority's suggestion that an issue in a death penalty case can be waived. Recognizing the irrevocable nature of the death penalty, this Court has, in the past, firmly adhered to the rule that *there can be no waiver in these cases*. [citing numerous cases] In this instance, however, the record reflects that the challenge to the exclusion was *without merit*.").

[5]Even for Witherspoon claims, Szuchon is the only case that failed to afford merits review. In every other case, the Pennsylvania Supreme Court noted that Witherspoon claims "are *waivable*," but addressed the Witherspoon claim *on the merits*. See Peterkin, 513 A.2d at 379; Lewis, 567 A.2d at 1380-81; Commonwealth v. Jasper, 610 A.2d 949, 952-53 (Pa. 1992).

[apply the relaxed waiver rule] in PCRA appeals." Id.

The Pennsylvania Supreme Court's post-Albrecht decisions confirm that Albrecht marked an abrupt about-face, and that, before Albrecht, the capital case relaxed waiver rule trumped ordinary procedural bar rules, including those imposed by the PCRA.[6]

---

[6]See Commonwealth v. Brown, 872 A.2d 1139, 1156 (Pa. 2005) (Albrecht was "the seminal case ... where this Court eliminated the capital case relaxed waiver rule on PCRA review"); id. at 1161-62 (Castille, J., concurring) (Albrecht "abrogated relaxed waiver on PCRA review ... thereby rendering the previously nonwaivable claims defaulted"); Commonwealth v. Hughes, 865 A.2d 761, (Pa. 2005) (Castille, J., concurring and dissenting) (Albrecht was "the seminal decision ... which eliminated the relaxed waiver rule on capital PCRA review precisely because that judicial rule wrongly subverted the PCRA's statutory waiver"); Commonwealth v. Crews, 863 A.2d 498, 504 (Pa. 2004) ("[B]etween the filing of his first and second [PCRA] petitions, relaxed waiver was abolished in capital PCRA cases. [Albrecht] Thus, when first PCRA counsel failed to raise certain issues, appellant was not on notice that counsel's failure would lead to an eventual time-bar of those claims."); Commonwealth v. Freeman, 827 A.2d 385, 398, 401 (Pa. 2003) (after McKenna, relaxed waiver rule was "expanded exponentially so as to reach the most commonplace of waived claims" and became "such a matter of routine that it is invoked to capture a myriad of claims, no matter how comparatively minor or routine"); Commonwealth v. Marshall, 810 A.2d 1211, 1231 (Pa. 2002) (Castille, J., concurring and dissenting) (relaxed waiver rule was "judicial negation of the PCRA's waiver provisions"); id. at 1232 (criticizing lead opinion's "relaxed waiver approach" of addressing barred claims on merits as "consistent with the approach taken in ... the cases pre-dating Albrecht"); Commonwealth v. Pirela, 726 A.2d 1026, 1030 n.5 (Pa. 1999) ("Appellant urges this court to ignore his waivers in this death penalty PCRA appeal. Although we have declined to apply ordinary waiver principles to capital cases in the past, we recently held that this practice will be discontinued. [Albrecht] Accordingly, appellant's request that we ignore his waivers is denied."); Commonwealth v. Laird, 726 A.2d 346, 354 (Pa. 1999) ("Petitioner argues ... that this court should review this issue under the relaxed waiver rule, which this court has applied in the past when reviewing PCRA appeals in death penalty cases. ... As stated in Albrecht, ... the [relaxed waiver] rule will no longer be applied to PCRA appeals in death penalty cases. Accordingly, this claim for relief has been waived."); Commonwealth v. Reyes, 870 A.2d 888, 893-94 (Pa. 2005) (holding claims procedurally barred under the PCRA because, after Albrecht, "the relaxed waiver doctrine no longer applies in PCRA appeals"); Commonwealth v. Rush, 838 A.2d 651, 655-56 (Pa. 2003) (same); Commonwealth v. Gribble, 863 A.2d 455, 468 (Pa. 2004) (same); Commonwealth v. Wilson, 861 A.2d 919, 928 n.8 (Pa. 2004) (same); Commonwealth v. Harris, 852 A.2d 1168, 1171 n.9 (Pa. 2004) (same); Commonwealth v. Hawkins, 787 A.2d 292, 296 (Pa. 2001) (same); Commonwealth v. Williams, 782 A.2d 517, 524 (Pa. 2001) (same); Commonwealth v. Chester, 733 A.2d 1242, 1253-54 (Pa. 1999) (same); Commonwealth v. Williams, 732 A.2d 1167, 1177 (Pa. 1999) (same); Commonwealth v. Breakiron, 729 A.2d 1088, 1096 (Pa. 1999) (same); Commonwealth v. Jacobs, 727 A.2d 545, 547 (Pa. 1999) (same); Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999) ("[W]e recently held that we would no longer apply the 'relaxed waiver' ... in appeals from post-conviction proceedings in capital cases. [Albrecht] Instead, we now require strict adherence to the statutory language of the

Thus, under the relaxed waiver rule, from 1978 until late 1998, the Pennsylvania Supreme Court did not apply procedural bars in capital cases, except possibly for Witherspoon claims.

2. **The Third Circuit**, in several habeas decisions, has surveyed the Pennsylvania Supreme Court's capital case decisions and concluded that, before Albrecht, the Pennsylvania Supreme Court *did not apply procedural bar rules* in capital cases, even when a procedural bar was seemingly required by the PCRA's statutory language.[7]

PCRA"); Commonwealth v. Yarris, 731 A.2d 581, 587 (Pa. 1999) (same); Commonwealth v. Marrero, 748 A.2d 202, 204 (Pa. 2000) (Nigro, J., concurring) (same); Commonwealth v. Carpenter, 725 A.2d 154, 160 n.5 (Pa. 1999) (same); Commonwealth v. Wallace, 724 A.2d 916, 920-21 (Pa. 1999) (In Albrecht, "this Court held that 'while it has been our practice to decline to apply our ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals.' ... Thus, under Albrecht, the relaxed waiver rule is no longer applicable in PCRA appeals and therefore, any claims that have been waived by Appellant are beyond the power of this Court to review under the terms of the PCRA."); Commonwealth v. Jones, 876 A.2d 380, 384 (Pa. 2005) (same); Commonwealth v. Hall, 872 A.2d 1177, 1182 (Pa. 2005) (same); Commonwealth v. Brown, 872 A.2d 1139, 1144 (Pa. 2005) (same); Commonwealth v. Johnson, 815 A.2d 563, 593 (Pa. 2002) (Eakin, J., concurring and dissenting) (before Albrecht's "abolition of relaxed waiver in PCRA capital appeals" procedurally barred claims were reviewed on merits); Commonwealth v. Wharton, 811 A.2d 978, 991 n.1 (Pa. 2002) (Saylor, J., concurring) (noting Albrecht's "retroactive abolition of relaxed waiver"; explaining that relaxed waiver "doctrine had been generally extended in [the PCRA] area and permitted review of the underlying allegations on their merits" even when procedurally barred; and finding it unfair to apply "the more stringent standards subsequently adopted by the Court" in Albrecht); Commonwealth v. Ford, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring) (Before Albrecht, relaxed waiver applied "in the post-conviction context" and "permitted review of the underlying allegation on its merits" despite procedural bar; prisoners "were justified in invoking the doctrine in styling and litigating their claims for relief. It is unjust, in my view, to penalize them for failing to frame and pursue their claims according to a far more stringent set of rules subsequently implemented by the Court."); id. at 348 (Eakin, J. dissenting) ("The doctrine of 'relaxed waiver' was eliminated by Albrecht. ... [R]etroactive application of the abolition of relaxed waiver puts those who litigated their petition before Albrecht at a disadvantage.").

[7]See, e.g., Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005) (described below); Jacobs v. Horn, 395 F.3d 92, 117 (3d Cir. 2005) ("Prior to Albrecht, ... the Pennsylvania Supreme Court applied the relaxed waiver doctrine in capital cases on PCRA appeal. Under the relaxed waiver doctrine, the Pennsylvania Supreme Court declined to apply ordinary waiver principles in capital cases in an effort to prevent the court 'from being instrumental in an unconstitutional execution.' On November 23, 1998, the Pennsylvania Supreme Court in Albrecht expressly abandoned the relaxed waiver doctrine in capital cases on PCRA appeal." (citations omitted)); Carpenter v. Vaughn, 296 F.3d 138, 147 (3d Cir. 2002) ("Pennsylvania Supreme Court did not end its practice of relaxing waiver rules in death penalty cases until 1998" in Albrecht); Szuchon v. Lehman, 273 F.3d 299, 326

3. **District Courts in Pennsylvania**, in numerous habeas decisions, have surveyed the Pennsylvania Supreme Court's capital case decisions and also found that, before Albrecht, the Pennsylvania Supreme Court *did not apply procedural bar rules* in capital cases, even when a procedural bar was seemingly required by the PCRA's statutory language.[8]

(3d Cir. 2001) (McKenna "was the seminal case on" the relaxed waiver rule, which "rather firmly established that a claim of constitutional error in a capital case would not be waived by a failure to preserve it"); Lambert v. Blackwell, 134 F.3d 506, 518 (3d Cir.1998) (before Albrecht, "the Pennsylvania Supreme Court had established a practice of reaching the merits of claims in PCRA petitions in capital cases notwithstanding the failure of the petitioner to meet the appropriate procedural requirements"); Banks v. Horn, 126 F.3d 206, 213-14 (3d Cir. 1997) ("Pennsylvania Supreme Court cases [before Albrecht] demonstrat[e] that it effectively looks beyond those [PCRA statutory bar] criteria in death penalty cases"; Pennsylvania Supreme Court had a "practice of reaching the merits of claims in PCRA petitions in capital cases regardless of the failure of the petition to meet the appropriate procedural criteria"; "Pennsylvania Supreme Court addressed the merits of claims which seemingly were precluded by the PCRA provisions then in force"); Laird v. Horn, 414 F.3d 419, 425 (3d Cir. 2005) (similar ruling); Jermyn v. Horn, 266 F.3d 257, 278-79 (3d Cir. 2001) (same); Fahy v. Horn, 240 F.3d 239, 245 (3d Cir. 2001) (same). The Third Circuit panels making these findings included Judges Alito, Barry, Becker, Cowen, Fuentes, Greenberg, Mansmann, McKee, Nygaard, Rendell, Roth, Scirica, Sloviter and Stapleton.

[8]See, e.g., Bronshtein v. Horn, 2001 WL 767593 (E.D. Pa. July 5, 2001) (described below); Pursell v. Horn, 187 F.Supp.2d 260, 293-94 (W.D. Pa. 2002) (authored by now-Third Circuit Judge Brooks Smith) ("[B]etween 1978 and 1998, the Pennsylvania Supreme Court simply did not adhere to [the PCRA procedural bar] provision in capital cases. In [McKenna], for instance, the Court stated that it had a 'duty to transcend procedural rules' in death penalty cases because procedural rules 'cannot be exalted to a position so lofty as to require this Court to bind itself to the real issue--the propriety of allowing the state to conduct an illegal execution of a citizen.' The doctrine set forth in McKenna became known as the 'relaxed waiver rule.' Under this rule, the Pennsylvania Supreme Court reviewed the merits of all claims raised in capital cases, whether on direct appeal or in post-conviction proceedings, regardless of any alleged waiver by the defendant." (footnoted and citations omitted)); id. at 293 n.11 (citing some of the "literally dozens of Pennsylvania Supreme Court cases between 1978 and 1998 that apply the 'relaxed waiver rule'"); id. at 294 (before Albrecht, "the relaxed waiver rule was firmly entrenched in Pennsylvania jurisprudence"); id. at 295 ("between 1978 and 1998, the Pennsylvania Supreme Court had a regular practice of forgiving waivers in capital cases, whenever they occurred, and reviewing the merits of a petition"); id. at 296 (before Albrecht, "one clear legal rule governed capital cases in Pennsylvania: the Pennsylvania Supreme Court addressed the merits of any post-conviction petition, regardless of its procedural failings"); Thomas v. Beard, --- F.Supp.2d ---, 2005 WL 2373930, *9-*10 & n.10 (E.D. Pa. Aug. 19, 2005) ("Albrecht represented an about-face in the Pennsylvania Supreme Court's treatment of waived claims in capital cases"; "the effective rule before *Albrecht* was one of no-waiver"; citing some of "numerous Pennsylvania cases relaxing the waiver bar in capital proceedings"); Rollins v. Horn,

4. **The Commonwealth's representations** in other capital cases also show that, before

---

2005 WL 1806504, *3 (E.D. Pa. July 26, 2005) ("[B]etween 1978 and 1998, it was the practice of the Pennsylvania Supreme Court to apply a relaxed waiver doctrine in capital cases. Under the relaxed waiver doctrine, the Pennsylvania Supreme Court reviewed the merits of all claims raised in capital cases, whether on direct appeal or in post-conviction proceedings, regardless of any waiver by the defendant. ... It was not until 1998 that the Pennsylvania Supreme Court, in [Albrecht], announced that it was ending its 'practice' of declining to apply ordinary waiver principles in PCRA appeals pursuant to the relaxed waiver doctrine."); id. at *3 n.4 (citing some of the "dozens of capital cases" in which the Pennsylvania Supreme Court applied relaxed waiver rule between 1978 and 1998); Baker v. Horn, 383 F.Supp.2d 720, 760 n.26 (E.D. Pa. 2005) ("Under the relaxed waiver doctrine, the Pennsylvania Supreme Court reached the merits of ostensibly waived claims."); Albrecht v. Horn, 314 F.Supp.2d 451, 458-60 (E.D. Pa. 2004) ("[F]rom 1978 until [Albrecht], the Supreme Court of Pennsylvania recognized a 'duty to transcend procedural rules' in capital cases. This perceived duty led to the doctrine of 'relaxed waiver' in death penalty cases, which amounted to a practice of reaching the merits of claims in PCRA petitions in capital cases regardless of the failure of the petition to meet the appropriate procedural criteria. ... [Albrecht] was the first capital case since 1978 in which the Supreme Court enforced the PCRA waiver rules ...." (citations omitted)); Fahy v. Horn, 2003 WL 22017231, *29 (E.D. Pa. Aug. 26, 2003) ("The Pennsylvania Supreme Court formerly applied a relaxed waiver rule for PCRA review of capital convictions, whereby the Court's practice was to address all issues arising in a death penalty case whether or not the issue was waived. [Albrecht] ... abandoned the practice of reaching the merits of a capital prisoner's claims despite procedural defaults. ... The Albrecht decision signaled a significant transformation in the court's approach to relaxed waiver"); Wallace v. Price, 2002 WL 31180963, *12 (W.D. Pa. Oct. 1, 2002) (Magistrate's Report & Recommendation) (Before Albrecht, "the Pennsylvania Supreme Court applied what it called a 'relaxed waiver rule' in capital cases, reviewing the merits of all claims raised, whether on direct appeal or in post-conviction proceedings, regardless of any alleged procedural bar at issue. As the Pennsylvania Supreme Court explained in [McKenna], it had a 'duty to transcend procedural rules' in death penalty cases because procedural rules 'cannot be exalted to a position so lofty as to require this Court to bind itself to the real issue–the propriety of allowing the state to conduct an illegal execution of a citizen.' ... In [Albrecht], the Pennsylvania Supreme Court refused to apply its relaxed waiver rule to issues raised for the first time in a PCRA petition."), adopted as modified on other grounds, 2003 WL 21295982 (W.D. Pa. Mar. 31, 2003); Yarris v. Horn, 230 F.Supp.2d 577, 582 n.1 (E.D. Pa. 2002) (under relaxed waiver, "Pennsylvania Supreme Court provided merits review of a death-sentenced prisoner's claims that would have been otherwise barred by state procedural rules"); Laird v. Horn, 159 F.Supp.2d 58, 74 (E.D. Pa. 2001) (before Albrecht, Pennsylvania Supreme Court "applied a relaxed waiver rule during PCRA review of capital convictions, whereby the Pennsylvania Supreme Court's 'practice [was] to address all issues arising in a death penalty case irrespective of a finding of waiver'" (quoting Morris, 684 A.2d at 1042 n.11)), aff'd, 414 F.3d 419 (3d Cir. 2005); Jacobs v. Horn, 129 F.Supp.2d 390, 399 (M.D. Pa. 2001) (before Albrecht, "[r]elaxed waiver was the general rule" in Pennsylvania capital cases), aff'd in relevant part, 395 F.3d 92, 117 (3d Cir. 2005). The District Judges making these findings include Judges Brody, Brooks Smith (now on the Third Circuit), DuBois, Giles, Joyner, Kaufman, McLaughlin, Munley, Pollak, Reed and Shapiro.

Albrecht, the relaxed waiver rule trumped the PCRA's statutory bar rules in capital cases, and the Pennsylvania Supreme Court's practice was to address procedurally barred claims on the merits.[9]

B. The PCRA "Time-Bar."

On January 16, 1996, the PCRA was amended to include, for the first time, time limits on obtaining PCRA relief. See 42 Pa.C.S. § 9545(b). Under the new amendment, with certain narrow exceptions, a PCRA petition must be filed within one year of the date the conviction becomes final on direct appeal.

---

[9]See, e.g., Commonwealth v. Jermyn, No. 134 Capital Appeal Docket, Brief for Commonwealth at 30 (Pa. Oct. 24, 1996) (filed by Pennsylvania Attorney General's Office) (admitting that the Pennsylvania Supreme Court had a practice of "'relaxing' (or virtually eliminating) the PCRA waiver rule in capital cases"); id. at 26 n.9 (rule is to "address[] all issues arising in a death penalty case, regardless of a finding of waiver"); id. (Pennsylvania Supreme "Court has a practice of ignoring waiver in death penalty cases"); id. at 29 (Pennsylvania cases "in essence, say that claims of error are never waived in death penalty cases"); id. at 37-38 (Pennsylvania Supreme Court's "practice [is] to address all issues arising in a capital case, irrespective of a finding of waiver"); id. at 38 (Pennsylvania Supreme Court addresses merits of barred claims "despite the lack of any attempt on [petitioner's] part to demonstrate" no waiver); id. at 41 n.22 (Pennsylvania Supreme Court "failed to apply [waiver] standard[s]" and "[i]nstead, it measured [waived] claims under the same standards applicable to" non-waived claims); id. at 27, 28-29, 36-39, 41-42 (relaxed waiver rule "overcome[s] the [PCRA] statute's dictates" regarding procedural bar; "ignored the [PCRA's] statutory requirement that a person bringing an action ... under the PCRA plead and prove ... that the allegation of error has not been waived"; "trumped the statutory requirement that a PCRA petitioner plead and prove that a claim for relief has not been waived"; "trumped the clear requirement of the PCRA concerning the showing of non-waiver"; "excused waiver when the language of the PCRA would have precluded such a result"; "ignored" PCRA's statutory bar rules); Commonwealth v. Carpenter, No. 178 Capital Appeal Docket, Brief for Commonwealth at 9-26 (Pa. Feb. 12, 1998) (filed by York County District Attorney's Office) (similar statements); Commonwealth v. Yarris, No. 232 Capital Appeal Docket, Brief for Commonwealth at 22 (Pa. Dec. 18, 1998) (filed by Delaware County District Attorney's Office) ("despite the express language of the PCRA requiring a defendant to show how a claim has not been waived to be eligible for relief under the PCRA, the [Pennsylvania] Supreme Court has not enforced the statutory language of the PCRA in capital cases"); Jacobs v. Horn, No. 99-CV-1203, Response to Petition for Writ of Habeas Corpus at 14 (M.D. Pa. Jan. 7, 2000) (filed by Pennsylvania Attorney General's Office) (before Albrecht, Pennsylvania Supreme Court "followed a practice of relaxed waiver. Under this practice, the court entertained the merits of a claim raised at any stage of the proceedings, regardless of whether the claim was technically waived"). Similarly, the Commonwealth's amicus in this Court admits that McKenna was the first "of a line of Pennsylvania cases ... in which *the Pennsylvania Supreme Court in capital cases waived the usual rule on failure to preserve claims*." Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petition for Writ of Certiorari, at 7.

The Pennsylvania Supreme Court first addressed the PCRA's time limits on December 21, 1998, in Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998), a capital case. The Court held Peterkin's PCRA petition untimely under § 9545(b) because it was not filed within one year of when his conviction became final, even though that was in *1988*, eight years *before* the PCRA contained any time limits. See id., 722 A.2d at 641-42. The Court did not mention the relaxed waiver rule or its curtailment of that rule in Albrecht, which it decided just one month before Peterkin.

The Pennsylvania Supreme Court next addressed the PCRA time limits on February 25, 1999, in Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999), another capital case. As in Peterkin, the Court did not mention the relaxed waiver rule or Albrecht. The Court held Cross' PCRA petition untimely because it was not filed within one year of when his conviction became final, even though that was in *1986*, ten years *before* the PCRA contained any time limits. See id., 726 A.2d at 334-35. The Court nevertheless *ruled on the merits* of a penalty-phase jury instruction claim that was both untimely and otherwise procedurally barred under the PCRA. See id., 726 A.2d at 336-38.

The Pennsylvania Supreme Court next addressed the PCRA time limits on March 2, 1999, in Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999), another capital case. As in Peterkin and Cross, the Court applied the time limits retroactively and held Banks' PCRA petition untimely because it was not filed in *1988*, eight years *before* the PCRA had time limits. Banks, 726 A.2d at 375-76. The Court for the first time addressed the capital case relaxed waiver rule, stating that the "gravity of the sentence imposed upon a defendant does not give us liberty to ignore" the PCRA's statutory language. Banks, 726 A.2d at 376. The Court did not attempt to reconcile this statement with its previous recognition that the relaxed waiver rule had *always* used the "gravity of the sentence" to trump "the very terms of the Post-Conviction Relief Act." Albrecht, 720 A.2d at 700.

C. Mr. Bronshtein's Case

1. State Court

Mr. Bronshtein was tried in the Montgomery County, Pennsylvania, Court of Common Pleas for the shooting death of Alexander Gutman. The Commonwealth's theory was that Mr. Bronshtein shot Mr. Gutman. The defense theory was that Mr. Gutman was shot by Adik Karlitsky; that Mr. Bronshtein was present; but that he did not kill Mr. Gutman, did not intend that he be killed and did not know that Mr. Karlitsky would kill him. The jury convicted Mr. Bronshtein of first-degree murder and related charges.

At capital sentencing, the defense presented testimony from family members who described Mr. Bronshtein's traumatic childhood, and expert testimony from psychologist Gerald Cooke, Ph.D. Dr. Cooke testified that Mr. Bronshtein suffers from severe mental health problems, including a depressive disorder and a paranoid personality disorder with grandiose and persecutory features, which had rendered him "acutely psychotic" and led to multiple suicide attempts. NT 4/22/94 at 80-109. The Commonwealth's psychiatrist agreed that Mr. Bronshtein has serious mental health problems. NT 4/22/94 at 115-17, 119-21.

The jury found two aggravating circumstances and three mitigating circumstances – "extreme mental or emotional disturbance," "poor childhood upbringing" and the "possibility that [Mr. Bronshtein] did not pull the trigger" – and sentenced him to death.

Mr. Bronshtein's conviction became final on October 20, 1997, after the Pennsylvania Supreme Court affirmed on direct appeal and this Court denied certiorari. Commonwealth v. Bronshtein, 691 A.2d 907 (Pa. 1997) ("Bronshtein-1"), cert. denied, 522 U.S. 936 (1997).

In December 1997, Mr. Bronshtein filed in the Court of Common Pleas (Ott, J.) a *pro se* petition for state post-conviction relief under Pennsylvania's Post-Conviction Relief Act ("PCRA").

In January 1998, however, Mr. Bronshtein wrote to Judge Ott that he wanted to withdraw the *pro se* PCRA petition and be executed. Judge Ott appointed psychiatrist Robert Sadoff, M.D., to

perform a competency evaluation. Dr. Sadoff met with Mr. Bronshtein, but was unable to explore his mental state because he was so paranoid and guarded. Dr. Sadoff submitted his report to Judge Ott on June 23, 1998, in which he stated that Mr. Bronshtein might be subject to execution under Ford v. Wainwright, 477 U.S. 399 (1986), but *he could not render an opinion on competency to waive post-conviction review*, and that further expert observation and evaluation were required before any opinion could be reached.[10]

After receiving Dr. Sadoff's report, Judge Ott found that further psychiatric evaluation was necessary before a competency-to-waive determination could be made. See NT 7/15/98 at 7, 9. Judge Ott informed Mr. Bronshtein of this on July 15, 1998. Shortly thereafter, Mr. Bronshtein attempted suicide, by slashing his own throat, in the Montgomery County jail.

On December 9, 1998, Judge Ott appointed psychiatrist Kenneth Weiss, M.D., to evaluate Mr. Bronshtein. Mr. Bronshtein, however, refused to see Dr. Weiss, and Dr. Weiss, like Dr. Sadoff, was *unable to render any opinion* about Mr. Bronshtein's competency to waive post-conviction review.

On January 26, 1999, despite the inability of any doctor to render an opinion about Mr. Bronshtein's competency to waive post-conviction review, and despite Judge Ott's own finding that he could not make a competency finding absent expert opinion, Judge Ott allowed Mr. Bronshtein to withdraw his *pro se* PCRA petition. Judge Ott ruled that withdrawal of the *pro se* PCRA petition was done "knowingly, intelligently and voluntarily," but he made *no finding that it was competent*. See Order of 1/26/99.

Mr. Bronshtein's mother and sister filed a notice of appeal and petitioned the Pennsylvania

---

[10]Under Ford, a prisoner is competent for execution if he knows that he will be executed and why he will be executed, a much narrower determination than whether a prisoner is competent to proceed in post-conviction litigation under Pennsylvania law. The latter, in contrast to Ford, looks to whether the prisoner can rationally assist counsel; has a rational understanding of the legal proceedings and processes; and, if he chooses not to proceed, whether the prisoner can make a knowing, intelligent and voluntary waiver of post-conviction rights.

Supreme Court for "next-friend" standing, alleging that Mr. Bronshtein's mental illness made him unable to make a rational choice to withdraw his *pro se* PCRA petition and be executed. In support, they proffered reports and affidavits from the psychiatrists appointed by the PCRA court (Drs. Sadoff and Weiss), and from three other mental health experts (psychologist Gerald Cooke, Ph.D.,[11] and psychiatrists Timothy Michals, M.D.,[12] and Robert Fox, M.D.). The experts described Mr. Bronshtein's severe mental health problems, which render him suicidal, extremely paranoid, uncommunicative, possibly delusional, and clinically depressed; they expressed substantial doubts about his competency to waive post-conviction review; and they found that *a competency finding could not be made without further expert observation and evaluation*. The next-friends also proffered the affidavit of Rabbi Russell Fox, who saw Mr. Bronshtein on March 14, 1999 and believed that he was "suffering from serious psychiatric disturbances." The Commonwealth did not present any evidence or proffer in opposition to these observations and expert opinions.

On April 16, 1999, despite the unrebutted expert opinion that Mr. Bronshtein is seriously mentally ill and that his competency to waive post-conviction rights was seriously in doubt and could not be determined without further expert observation and evaluation, the Pennsylvania Supreme Court held that Mr. Bronshtein had withdrawn his *pro se* PCRA petition. Commonwealth v. Bronshtein, 729 A.2d 1102 (Pa. 1999) ("Bronshtein-2"). The Pennsylvania Supreme Court relied on Dr. Sadoff's suggestion that Mr. Bronshtein might be subject to execution under Ford v. Wainwright. The Pennsylvania Supreme Court completely overlooked that the Ford issue is very different from competency to waive post-conviction review. See Bronshtein-2 at 1106-08. The Pennsylvania Supreme Court did not even mention the legal distinction between the two issues. See note 10, supra (discussing this distinction). Chief Justice Flaherty dissented, and would have ordered further competency evaluation. Bronshtein-2 at 1108-09.

---

[11]Dr. Cooke was the defense mental health expert at capital sentencing.

[12]Dr. Michals was the *Commonwealth*'s mental health expert at capital sentencing.

On April 26, 1999, Mr. Bronshtein's mother and sister filed in the United States District Court for the Eastern District of Pennsylvania (Reed, J.) an application for next-friend standing, habeas corpus relief and stay of execution.

The same day, Mr. Bronshtein informed the District Court that he had not wanted to die; wanted to litigate his post-conviction claims; and wanted counsel to represent him. The previously filed application for next-friend standing was accordingly withdrawn and, on April 28, 1999, Mr. Bronshtein filed in the District Court a motion for stay of execution and appointment of counsel. On April 29, 1999, the District Court stayed the execution and appointed counsel.

Counsel's investigation and preparation of the habeas petition revealed a number of claims that had not been presented to the state courts. Accordingly, on June 9, 1999, Mr. Bronshtein filed an amended PCRA petition in the Montgomery County Court of Common Pleas (Ott, J.) to exhaust his claims. The District Court placed federal proceedings in suspense pending exhaustion.

On October 19, 1999, Common Pleas Judge Ott dismissed the amended PCRA petition, ruling that it was time-barred under the PCRA because it was not filed within the one year limitations period of 42 Pa.C.S. § 9545(b)(1), and that Mr. Bronshtein had also "irrevocably waived" PCRA review in January 1999 when he was allowed to withdraw his *pro se* PCRA petition.

On June 19, 2000, the Pennsylvania Supreme Court affirmed the denial of PCRA relief, holding that all of Mr. Bronshtein's claims were procedurally barred. Commonwealth v. Bronshtein, 752 A.2d 868 (Pa. 1999) ("Bronshtein-3"). *The Pennsylvania Supreme Court did not hold that Mr. Bronshtein defaulted his claims when he was allowed to withdraw his* pro se *PCRA petition in January 1999*; instead, it held that he defaulted on *October 20, 1998*, when he failed to file his petition within one year of the date when his conviction became final on direct appeal. See Bronshtein-3 at 870-71.

2. District Court

The District Court reactivated Mr. Bronshtein's case. The District Court first addressed the procedural default question raised by Bronshtein-3's PCRA time-bar ruling. The District Court described the law of procedural default, as set forth in this Court's cases:

> The law of procedural default is an outgrowth of the independent and adequate state ground doctrine, which provides that federal courts may not exercise jurisdiction over state court decisions that are based purely on matters of state law. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). The Supreme Court has observed, "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." Coleman v. Thompson, 501 U.S. 722, 729 (1991). Procedural default due to an adequate and independent state ground does not technically deprive a federal court of jurisdiction; rather, it counsels against federal court involvement out of concern for comity and federalism. See Lambrix v. Singletary, 520 U.S. 518, 523 (1997). As the Supreme Court observed in Coleman:
>
> > Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.... The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.
>
> Coleman, 501 U.S. at 732.
>
> The independent and adequate state ground doctrine ... may prevent a federal court from considering the merits of claims made in a federal habeas petition when a state court has declined to hear the merits of those claims because petitioner failed to comply with a state procedural rule. See Wainwright v. Sykes, 433 U.S. 72, 82 (1977). ... The independence of a state rule is not an issue in this case ....
>
> The resolution of the adequacy question requires an investigation of the background and precedent of the relevant state rule or practice. The Supreme Court of the United States has observed that "only a 'firmly established and regularly followed state practice' may be interposed by a state to prevent subsequent review by this Court of a federal constitutional claim." Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (quoting NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958)). A state rule is adequate only if it is "consistently and regularly applied," Johnson v. Mississippi, 486 U.S. 578, 587 (1988), "strictly or regularly followed," id., and applied "evenhandedly to all similar claims," Hathorn v. Lovorn, 457 U.S. 255, 263 (1982). This does not mean that a state's "willingness in a few cases to overlook the rule" renders the rule inadequate. See Banks v. Horn, 126 F.3d 206, 211 (3d Cir. 1997). As long as a state has applied the rule in "the vast majority of cases," the rule will be deemed adequate. Dugger v. Adams, 489 U.S. 401, 410 n.6

(1989) ....

Bronshtein v. Horn, 2001 WL 767593, *4-*6 (E.D. Pa. July 5, 2001) ("Bronshtein-4").

The District Court explained that the procedural default analysis in this case was simplified by the fact that the Pennsylvania Supreme Court's opinion (Bronshtein-3) *expressly identified* both the procedural bar rule applied and the time at which Mr. Bronshtein defaulted under that rule:

> The relevant [procedural bar] rule [applied by the state court] is gleaned from the decision of the highest state court that dismissed the claims on procedural grounds. In the instant case, the Supreme Court of Pennsylvania dismissed Bronshtein's second PCRA petition as untimely filed, holding that it was barred by 42 Pa.C.S. § 9545(b)(1), which requires PCRA petitions to be filed within one year of final judgment. The supreme court held that the one-year rule deprived courts of jurisdiction over late-filed petitions, and was not subject to any exceptions beyond those set forth in the statute. The relevant rule in this case, then, is the rule that § 9545(b)(1) operates as an absolute, jurisdictional bar to hearing the merits of a late PCRA petition, and that no exceptions outside those in the statute may save a petition filed more than one year after the date judgment becomes final.
>
> * * *
>
> The Supreme Court of Pennsylvania [also] identified with precision the date the waiver occurred in this case:
>
> > Here, Appellant's judgment became final on October 20, 1997, the date that the United States Supreme Court denied *certiorari*. Thus, Appellant was required to file his petition for post-conviction relief within one year of October 20, 1997, that is by October 20, 1998, in order for his PCRA petition to be timely filed. Instead, Appellant filed this, his second, petition for post-conviction relief on June 9, 1999, well beyond the one-year limit prescribed by § 9545(b)(1).
>
> [Bronshtein-3 at 615]. The [Pennsylvania] Supreme Court fixed the date of the waiver in this case as October 20, 1998, the date Bronshtein should have filed his second PCRA petition. Thus, my procedural analysis will focus on Pennsylvania law as it stood as of October 20, 1998.

Bronshtein-4 at *5 (some citations to Bronshtein-3 omitted).

The District Court then surveyed the Pennsylvania Supreme Court's capital case default law and concluded that the PCRA time-bar is not an adequate state ground as applied to Mr. Bronshtein because, given the relaxed waiver rule, "it was neither clearly established nor regularly followed at the time of Bronshtein's waiver in October 1998, that a late-filed PCRA petition in a capital case would be dismissed as untimely." Bronshtein-4 at *8. The District Court explained:

> The "relaxed waiver" doctrine is the term given to the Supreme Court of Pennsylvania's long-standing, well-established practice of relaxing its enforcement of state procedural rules in death penalty cases. This practice was explicitly applied in numerous capital cases on both direct appeal and in PCRA proceedings, to reach the merits of petitions despite violations of variety of statutory and judicial procedural rules. [citing cases]
>
> The Supreme Court of Pennsylvania did not begin to change its approach to waiver in capital cases until November 1998, a month after Bronshtein's "waiver." In [Albrecht], the court observed, "While it has been our 'practice' to decline to apply ordinary waiver principles in capital cases, we will no longer do so in PCRA appeals." Subsequent mentions of Albrecht by the Supreme Court of Pennsylvania made it clear that Albrecht marked a sea-change in the court's approach to waiver in death penalty cases. [citing cases]
>
> The rule of Albrecht was applied directly to the one-year deadline in § 9545(b)(1) in Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999). The Banks decision relied on Albrecht in concluding that
>
> > ... The Legislature has spoken on the requisites of receiving relief under the PCRA and has established a scheme in which PCRA petitions are to be accorded finality. The gravity of the sentence imposed upon a defendant does not give us liberty to ignore those clear mandates.
>
> Id. at 6, 726 A.2d 374; see also Commonwealth v. Fahy, 558 Pa. 313, 325, 737 A.2d 214 (1999).
>
> While it now appears to be clearly established that a late-filed PCRA petition will no longer be considered under the relaxed waiver rule, back in October 1998, relaxed waiver remained viable in PCRA cases. Because it is clear that the relaxed waiver doctrine did not fall out of favor in the PCRA context until after the waiver in the instant case occurred, Bronshtein's second PCRA petition was not dismissed on the basis of an adequate state ground.

Bronshtein-4 at *8 n.17; see also id. at *6-*10.

Accordingly, the District Court reviewed the merits of Mr. Bronshtein's claims. It found that constitutional error infected the trial and capital sentencing, and granted relief.

The District Court held that the first-degree murder conviction should be vacated because the jury instructions relieved the Commonwealth of its due process-imposed burden of proving every element of first-degree murder beyond a reasonable doubt. See Bronshtein-4 at *12-*17. The District Court, however, did not vacate the non-homicide convictions (robbery, theft and conspiracy). See Bronshtein-4 at *24 n.35; Bronshtein v. Horn, 2001 WL 936702 (E.D. Pa. Aug. 16, 2001) ("Bronshtein-5").

The District Court also found that constitutional violations required relief from the death sentence. It held that the trial court's failure to instruct the jury that life imprisonment in Pennsylvania is without possibility of parole, when the prosecutor "unmistakably placed Bronshtein's future dangerousness at issue," violated due process under this Court's decision in Simmons v. South Carolina, 512 U.S. 154 (1994). See Bronshtein-4 at *17-*21.

The Commonwealth appealed from the District Court's grant of relief. Mr. Bronshtein appealed from the District Court's upholding of the non-homicide convictions.

3. Third Circuit

The Third Circuit, with Judge Alito writing for a unanimous panel, agreed with the District Court that there is no adequate state procedural ground here; agreed with the District Court that Mr. Bronshtein's death sentence is unconstitutional under Simmons v. South Carolina; but held that the due process violation at the guilt-phase was harmless error and, so, reversed the District Court's grant of guilt-phase relief. See Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005) ("Bronshtein-6").

The Third Circuit first described this Court's procedural default law:

> The procedural default doctrine precludes a federal habeas court from "review[ing] a question of federal law decided by a state court if the decision of that court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991) (emphasis added). The United States Supreme Court has employed a variety of tests to determine whether a state ground is "adequate." Among other things, state procedural rules have been held to be inadequate if they are not "firmly established and regularly followed," Ford v. Georgia, 498 U.S. 411, 424 (1991) (quoting James v. Kentucky, 466 U.S. 341, 348-51 (1984)); see also Barr v. City of Columbia, 378 U.S. 146, 149 (1964), or if they are "novel[]" and unforeseeable. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457 (1958); see also Ford, 498 U.S. at 424.
>
> First, the test ensures that federal review is not barred unless a habeas petitioner had fair notice of the need to follow the state procedural rule. As we said in Cabrera v. Barbo, 175 F.3d 307, 313 (3d Cir. 1999), "a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in a federal court."
>
> Second, the "'firmly established and regularly followed' test" prevents discrimination. "Novelty in procedural requirements," NAACP v. Alabama ex rel. Patterson, 357 U.S. at 457, can be used as a means of defeating claims that are disfavored on the merits. If inconsistently applied procedural rules sufficed as

"adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules" – directions of general applicability – rather than by whim or prejudice against a claim or claimant.

Bronshtein-6 at 707-08.

The Third Circuit described the District Court's finding that there is no adequate state procedural ground here:

> First, the [District] Court identified the relevant rule as "the rule that § 9545(b)(1) operates as an absolute, jurisdictional bar to hearing the merits of a late PCRA petition, and that no exceptions outside those in the statute may save a petition filed more than one year after the date judgment becomes final." Second, the Court concluded that the relevant point in time was "the moment petitioner violated the procedural rule; that is, at the time Bronshtein's one-year window under § 9545(b)(1) closed." Since direct review of Bronshtein's conviction and sentence ended when the United States Supreme Court denied his petition for a writ of certiorari on October 20, 1997, the District Court concluded that the critical date was October 20, 1998. Finally, the Court found that the state procedural rule applied by the Pennsylvania Supreme Court was not "firmly established and regularly followed" on that date.

Bronshtein-6 at 708 (citations omitted).

The Third Circuit then addressed the procedural default issue, agreeing with the District Court that there is no adequate state procedural ground here:

> We agree with the District Court that the rule applied by the Pennsylvania Supreme Court was not firmly established and regularly applied until after Bronshtein missed the PCRA's one-year filing deadline. To be sure, the pertinent statutory provision, 42 Pa. Cons.Stat. Ann. § 9545(b), which took effect on January 16, 1996, appears on its face to impose a one-year deadline .... Nevertheless, as the District Court observed, strict enforcement of the provision did not begin immediately.
>
> Well before the enactment of this provision, the Pennsylvania Supreme Court had begun to apply a "relaxed waiver rule" in capital cases. See Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). In McKenna, the Court stated that it bore a "duty to transcend procedural rules" in capital cases because of the "overwhelming public interest" in preventing unconstitutional executions. Id. at 180-81. As we have observed, McKenna for a time "firmly established that a claim of constitutional error in a capital case would not be waived by a failure to preserve it." Szuchon v. Lehman, 273 F.3d 299, 326 (3d Cir.2001).
>
> Twenty years later, on November 23, 1998, the state supreme court changed course in Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998). After

noting that it had long been the Court's "'practice' to decline to apply ordinary waiver principles in capital cases," the Court stated that this rule had "in effect, virtually eliminated any semblance of finality in capital cases." Id. at 700. The Court concluded that the "benefits of relaxed waiver at the PCRA appellate stage" were greatly outweighed by the need for finality and judicial efficiency, and the Court announced that the relaxed waiver rule would "no longer [apply] in PCRA appeals." Id.

On December 21, 1998, the state supreme court held in Commonwealth v. Peterkin, 554 Pa. 547, 722 A.2d 638 (1998), that the PCRA time bar applies to capital cases and is not superceded by the relaxed waiver rule. Finally, on March 2, 1999, the state supreme court held unequivocally in Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999), that the PCRA time limits are jurisdictional and thus not subject to judicial relaxation. ... For present purposes, ... it is not necessary for us to decide whether Albrecht, Peterkin, or Banks marked the critical point in time because Bronshtein's one-year deadline expired before the earliest of the three dates. As of October 20, 1998 – the one-year anniversary of the conclusion of direct review in Bronshtein's case – Bronshtein did not have fair notice that he would not be given the benefit of the "relaxed waiver" rule and that his failure to file his PCRA petition within the one-year statutory deadline would result in the dismissal of his petition. Moreover, holding Bronshtein strictly to the one-year deadline would have denied him the more lenient treatment that the state courts had allowed other capital defendants up to that point. We thus agree with the District Court that the state procedural rule at issue in this case – the rule strictly requiring a capital defendant to file a PCRA petition within one year after the end of direct review – was not firmly established and regularly followed at the time in question.

Bronshtein-6 at 708-09.

Finally, the Third Circuit noted that its finding that there is no adequate state procedural ground was tightly linked to the fact that the Pennsylvania Supreme Court eliminated the relaxed waiver rule *without notice* and *without giving a grace period* to petitioners who had been litigating under the traditional Pennsylvania Supreme Court approach in capital cases:

Our analysis of the question of procedural default would proceed along a different path if the Pennsylvania Supreme Court, when it abandoned the doctrine of "relaxed waiver," had adopted what might be termed a "transitional rule," i.e., a rule imposing a special filing deadline for those cases in which a PCRA petitioner's one-year filing period expired prior to the end of the "relaxed waiver" era. Accordingly, it would have made sense for the state supreme court to have adopted a rule requiring such petitioners to file within some specified time after the termination of the doctrine of "relaxed waiver." However, no such transitional rule was invoked by the state supreme court in this case, and none has been called to our attention. The only state law ground that we may consider in deciding the issue of procedural default in this case is the general one-year deadline. Because this rule was not firmly established

> and regularly applied on the date when Bronshtein's time ran out, the doctrine of procedural default does not apply in this case.

Bronshtein-6 at 709-10 (footnote omitted).[13]

Turning to the merits, the Third Circuit reversed the District Court's grant of relief with respect to the first-degree murder conviction. Like the District Court, the Third Circuit found that the jury instructions on murder violated due process. The Third Circuit held, however, that the error was harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). See Bronshtein-6 at 710-15. The Third Circuit also affirmed the District Court's denial of relief with respect to the non-homicide convictions, holding that the claims related to those convictions were meritless and/or procedurally barred. See Bronshtein-6 at 720-32. Thus, the Third Circuit did not allow any guilt-phase relief.

As to penalty-phase, the Third Circuit affirmed the District Court's grant of relief under Simmons v. South Carolina. The Third Circuit found that the prosecution presented "future dangerousness" evidence through its own mental health expert, Dr. Michals, and through cross-examination of the defense expert, Dr. Cooke:

> Drs. Cooke and Michals suggested the following: that Bronshtein's "combination of personality disorders" could be "lethal" or "explosive"; that he was prone to lie, scheme, steal, fight, and act very aggressively; that he was much more likely than a normal person to distrust others, bear grudges, feel threatened, and respond with a counterattack; that he was unable to "play by the rules in a civilized society"; that he was probably remorseless, and unlikely to learn from experience, and thus prone to commit the same crimes "over again"; and that there would probably be an "acceleration" of his anti-social behavior.

Bronshtein-6 at 719; see also id. at 717-19 (quoting testimony).

The Third Circuit also found that the prosecutor made "future dangerousness" arguments, based upon this evidence, by asserting to the jury:

> Ladies and gentlemen, the medical testimony in this case was significant because it tells you something about the psyche or persona of this man. *He can't conform to what is required in society. The doctors have told you that he's anti-*

---

[13] Compare State v. Wessinger, 736 So.2d 162, 180 (La. 1999) (ending Louisiana capital case relaxed waiver rule *prospectively*, beginning with penalty-phases held after Wessinger).

> *social.* He's prone to lying. He's prone to stealing. *He's prone to living a life of crime.*
>
> Whatever the seeds were that got him there, they're planted, and that tree has grown. He's grown into a twenty-two-year-old person now regardless of how the seeds were planted.
>
> You have to take a look at what effect that has had and what effect it had at the time he committed these crimes. *The doctors have told you he's a man that can't conform to the needs of society.*

Bronshtein-6 at 716-17 (emphasis in Bronshtein-6).

Given this evidence and argument, the Third Circuit found that, "[i]n any realistic sense of the concept, the prosecutor 'argue[d] that the defendant [would] pose a threat to society in the future[,]' Simmons, 512 U.S. at 177 (O'Connor, J., concurring in the judgment)," and thus, Simmons was violated when the court failed to instruct that life imprisonment is without possibility of parole. Bronshtein-6 at 719. The Third Circuit therefore affirmed the District Court's grant of penalty-phase relief. Id. at 719-20.

The Commonwealth does not challenge the propriety of the Third Circuit's analysis and conclusion on the merits of the Simmons constitutional error. The Commonwealth presents only a procedural contention. In light of the Pennsylvania Supreme Court's traditional no-procedural-default approach in capital cases and the decisions of every Third Circuit panel and numerous District Courts familiar with Pennsylvania practice, the Commonwealth's certiorari contention lacks merit.

REASONS FOR DENYING THE WRIT

The Third Circuit cited, accurately described and applied this Court's precedents on the adequate state ground doctrine – e.g., Coleman v. Thompson; Ford v. Georgia; Dugger v. Adams; Johnson v. Mississippi; James v. Kentucky; Hathorn v. Lovorn; Wainwright v. Sykes; Barr v. City of Columbia; NAACP v. Alabama ex rel. Patterson. The Third Circuit did not misapply this Court's law. Even if the Third Circuit had erred, which it did not, there is no reason to grant certiorari when "the asserted error consists of ... the misapplication of a properly stated rule of law." Supreme Court Rule 10.

This Court is especially averse to reviewing the issue the Commonwealth presents here – a Court of Appeals' ruling on the adequacy of a state court procedural bar ruling. As this Court has "repeatedly recognized, the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit" and, thus, in the best position to make such rulings. Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (declining to address procedural bar issue).[14] Here, an experienced District Judge (Judge Reed, appointed by President Reagan in 1987) and three experienced Third Circuit Judges (Judges Alito, Barry and Stapleton), all of whom are familiar with Pennsylvania law, carefully surveyed the Pennsylvania Supreme Court's capital case precedents and concluded that there is no adequate state ground barring merits review of Mr. Bronshtein's claims.

Moreover, Third Cirucit Judges Alito, Barry and Stapleton, and District Judge Reed, are far from alone in ruling that there is no adequate state procedural ground given the Pennsylvania Supreme Court's capital jurisprudence and its implications under federal procedural default law. At least *twenty-five* Third Circuit and District Court Judges – including Circuit Judges Alito, Barry, Becker, Cowen, Fuentes, Greenberg, Mansmann, McKee, Nygaard, Rendell, Roth, Scirica, Sloviter and Stapleton, and District Judges Brooks Smith (now on the Third Circuit), Brody, DuBois, Giles, Joyner, Kaufman, McLaughlin, Munley, Pollak, Reed and Shapiro – have made similar rulings. See

---

[14] Accord id. at 547 (O'Connor, J., dissenting) ("As the Court points out, the Court of Appeals is better suited to evaluating matters of state procedure [relevant to procedural bar issues] than are we."); Selvage v. Collins, 494 U.S. 108, 110 (1990) (per curiam) (remanding to Court of Appeals for determination of procedural bar issue because Court of Appeals "is more familiar with [state] law than we are"); Granberry v. Greer, 481 U.S. 129, 136 n.9 (1987) ("Petitioner has also contested the Court of Appeals' determination that he failed to exhaust his state remedies. ... On that issue, however, we defer to the Court of Appeals which is more familiar with Illinois' practice than we are."); Rummel v. Estelle, 445 U.S. 263, 267 n.7 (1980) (rejecting state's procedural bar argument by "[d]eferring to the Court of Appeals interpretation of Texas law"); County Court of Ulster Cty. v. Allen, 442 U.S. 140, 153-54 (1979) (declining to find procedural bar where "three Second Circuit Judges, whose experience with New York practice is entitled to respect, concluded that" there was no adequate and independent state ground); Butner v. United States, 440 U.S. 48, 57-58 (1979) (lower federal courts better suited to decide questions of state law).

notes 7-8, supra. This is not surprising in light of the Pennsylvania Supreme Court's traditional capital case relaxed waiver approach, the Pennsylvania Supreme Court's sudden retreat from that approach in Albrecht, and the Pennsylvania Supreme Court's application of Albrecht's new approach retroactively to deny review in cases that had been litigated under the traditional no-procedural-default approach.

Indeed, the inadequacy of the Pennsylvania Supreme Court's bar ruling in this case has even been recognized by Justices of the Pennsylvania Supreme Court. As stated above, the Pennsylvania Supreme Court has repeatedly recognized that Albrecht was an abrupt about-face, in which Pennsylvania's capital jurisprudence was transformed from one in which procedural default rules were not enforced to one in which they are. See Counter-Statement of the Case § A.1. Pennsylvania's Supreme Court Justices have recognized that this sudden transformation was unfair to those, like Mr. Bronshtein, who began their litigation under the old, no-bar regime.[15]

Pennsylvania Supreme Court Justice Saylor has even noted with approval that "the *federal courts have declined to treat the retroactive elimination of relaxed waiver as a procedural bar to federal habeas corpus relief*"; Justice Saylor explained that federal habeas decisions finding no adequate state ground in Pennsylvania capital cases are "*appropriate*"; and Justice Saylor cited *the District Court's decision in the instant case* as an "appropriate" federal court finding of no adequate

---

[15]See, e.g., Brown, 872 A.2d at 1161-62 (Castille, J., concurring) (Albrecht "render[ed] previously nonwaivable claims defaulted"); Crews, 863 A.2d at 504 ("[B]etween the filing of his first and second [PCRA] petitions, relaxed waiver was abolished in capital PCRA cases. [Albrecht] Thus, when first PCRA counsel failed to raise certain issues, appellant was *not on notice* that counsel's failure would lead to an eventual time-bar of those claims."); Wharton, 811 A.2d at 991 n.1 (Saylor, J., concurring) (Albrecht's "retroactive abolition of relaxed waiver" makes it unfair to apply "the more stringent standards subsequently adopted by the Court"); Ford, 809 A.2d at 337-38 (Pa. 2002) (Saylor, J., concurring) (Before Albrecht, prisoners "were justified in invoking the [relaxed waiver] doctrine in styling and litigating their claims for relief. It is unjust ... to penalize them for failing to frame and pursue their claims according to a far more stringent set of rules subsequently implemented by the Court."); id. at 348 (Eakin, J. dissenting) ("[R]etroactive application of the abolition of relaxed waiver puts those who litigated their petition before Albrecht at a disadvantage.").

state ground. See Ford, 809 A.2d at 338 (Saylor, J., concurring) (citing Bronshtein-4 at *7-*8 n.17, and Pursell v. Horn, 187 F.Supp.2d at 296-97).[16]

Against this overwhelming background – e.g., more than *eighty* Pennsylvania Supreme Court opinions describing the relaxed waiver rule, its retroactive abolition and the unfairness created thereby, see Counter-Statement of the Case § A.1; the Commonwealth's own admissions about the nature of the relaxed waiver rule, see id. § A.4; the well-reasoned decisions of at least *twenty-five* federal judges who are familiar with Pennsylvania law and found procedural bar rules not adequate in Pennsylvania capital cases in the wake of the abolition of relaxed waiver, see id. § A.2-3 – the Commonwealth musters two procedural arguments for certiorari, both meritless.

First, the Commonwealth says the Third Circuit "mechanical[ly] ... fixed the date of default" as October 20, 1998, one year after Mr. Bronshtein's conviction became final; according to the Commonwealth, the "actual" default was in January 1999, when the PCRA court allowed withdrawal of Mr. Bronshtein's *pro se* PCRA petition. *Petition* at 20.

But it was *not the Third Circuit* that "fixed the date of default" – it was the *Pennsylvania Supreme Court*. As the District Court explained, the adequate state ground doctrine looks to the "decision of the highest state court that dismissed the claims on procedural grounds" to determine what bar rules were applied by the state court. Bronshtein-4 at *5. Here, the "*Supreme Court of Pennsylvania* identified with precision the date the waiver occurred in this case .... The *[Pennsylvania] Supreme Court* fixed the date of the waiver in this case as *October 20, 1998*." Bronshtein-4 at *5 (quoting Bronshtein-3). Since *the Pennsylvania Supreme Court* "identified" and "fixed the date" of default as October 20, 1998, it plainly was appropriate for the federal courts to look to that date in applying the adequate state ground doctrine. See Harris v. Reed, 489 U.S. 255, 265 n.12 (1989) (adequate state ground doctrine looks to procedural bar rules actually applied by

---

[16]Pursell v. Horn, authored by then-Chief District Judge, now Third Circuit Judge, D. Brooks Smith, held that the PCRA time-bar was not an adequate state ground in a capital case.

state court); Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (same).

Moreover, there is an obvious reasons *why* the Pennsylvania Supreme Court deemed the claims barred as of October 20, 1998, rather than in January 1999 as suggested by the Commonwealth. Any ruling that Mr. Bronshtein defaulted his claims in January 1999 when the state court allowed withdrawal of his *pro se* PCRA petition would be *directly in conflict with Pennsylvania Supreme Court precedent* holding that a death-sentenced prisoner who makes a "knowing, voluntary and intelligent" waiver of PCRA review and "withdraws" his PCRA petition must be allowed to "retract" that withdrawal, "reinstate" his PCRA proceedings and obtain review when he asks for such PCRA review. See, e.g., Commonwealth v. Saranchak, 810 A.2d 1197, 1197-1200 (Pa. 2002).[17] As the District Court recognized, under Pennsylvania law the January 1999 "withdrawal of his first PCRA petition did not, in and of itself, prevent him from bringing a subsequent PCRA petition. The *Commonwealth does not appear to contend otherwise.*" Bronshtein-4 at *3 n.5.[18]

The Commonwealth's second assertion is that the Third Circuit supposedly has adopted a "one-size-fits-all approach" to procedural default, paying no attention to the facts of the case or the procedural rule at issue, and has used this approach to willy-nilly grant relief in capital cases. *Petition* at 10. Again, the Commonwealth errs.

First, the Third Circuit has *denied relief* in capital habeas cases from Pennsylvania.[19]

---

[17]See also Commonwealth v. Michael, 755 A.2d 1274 (Pa. 2001) (addressing merits of PCRA claims after petitioner repeatedly withdrew and then changed mind and reinstated).

[18]The Commonwealth's failure to argue for the January 1999 default date in the District Court should constitute a waiver of that argument, see Trest v. Cain, 522 U.S. 87, 89 (1997), another reason why certiorari should be denied.

[19]See, e.g., Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) (reversing district court grant of penalty-phase relief in a Pennsylvania capital case), subsequent history, 125 S.Ct. 2456 (2005) (reversing Third Circuit's denial of relief); Hackett v. Price, 381 F.3d 281 (3d Cir. 2004) (reversing district court grant of penalty-phase relief in Pennsylvania capital case); Whitney v. Horn, 280 F.3d 240 (3d Cir. 2002) (reversing district court grant of guilt-phase relief in Pennsylvania capital case);

Moreover, in Pennsylvania capital habeas cases, *including this case*, the Third Circuit has *found claims to be procedurally barred*.[20] Further, in Pennsylvania non-capital habeas cases, the Third Circuit has denied relief and found claims procedurally barred.[21] Indeed, the imposition of procedural bars in Pennsylvania non-capital habeas cases is so routine that the issue seldom reaches the Third Circuit – District Courts in Pennsylvania, applying Third Circuit law, routinely apply procedural bars and deny a certificate of appealability on the issue.[22] Finally, in capital habeas cases

---

Buehl v. Vaughn, 166 F.3d 163 (3d Cir. 1999) (affirming district court denial of relief in Pennsylvania capital case); Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989) (reversing district court grant of guilt-phase relief in Pennsylvania capital case); Terry v. Petsock, 974 F.2d 372 (3d Cir. 1992) (affirming district court denial of relief in Pennsylvania capital case); Frey v. Fulcomer, 974 F.2d 348 (3rd Cir. 1992) (reversing district court grant of penalty-phase relief in Pennsylvania capital case); Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991) (affirming district court denial of relief in Pennsylvania capital case); White v. Horn, 191 F.3d 446 (3d Cir. 1999) (table) (affirming district court denial of relief in Pennsylvania capital case); see also Morris v. Horn, 187 F.3d 333 (3d Cir. 1999) (affirming district court denial of Rule 60(b) relief in Pennsylvania capital case); Christy v. Horn, 115 F.3d 201 (3d Cir. 1997) (vacating district court "stay and abey" order in Pennsylvania capital case); In re Zettlemoyer, 53 F.3d 24 (3d Cir. 1995) (affirming district court denial of next-friend standing in Pennsylvania capital case).

[20]See, e.g., Bronshtein-6 at 728; Rompilla, 355 F.3d at 261; Szuchon, 273 F.3d at 307, 324 (*sua sponte* imposing procedural bar even though Commonwealth had waived that defense); Whitney, 280 F.3d at 250-53; Carpenter, 296 F.3d at 141, 148-49.

[21]See, e.g., Fountain v. Kyler, 420 F.3d 267, 272 (3d Cir. 2005); Tillery v. Horn, 142 Fed.Appx. 66 (3d Cir. 2005); Benshunas v. Klem, 137 Fed.Appx. 510 (3d Cir. 2005); Richardson v. Warden, 125 Fed.Appx. 395 (3d Cir. 2005); Buck v. Colleran, 115 Fed.Appx. 526 (3d Cir. 2004); Rill v. Meyers, 87 Fed.Appx. 822 (3d Cir. 2004); Williams v. Price, 343 F.3d 223, 237 (3d Cir. 2003); Mattis v. Vaughn, 80 Fed.Appx. 154 (3d Cir. 2003); Lutz v. Brennan, 67 Fed.Appx. 151 (3d Cir. 2003); Willis v. Vaughn, 48 Fed.Appx. 402 (3d Cir. 2002); Sweger v. Chesney, 294 F.3d 506, 520-24 (3d Cir. 2002); Marra v. Larkins, 46 Fed.Appx. 83, 89-93 (3d Cir. 2002); Weaver v. Frank, 36 Fed.Appx. 693, 696 (3d Cir. 2002); Cristin v. Brennan, 281 F.3d 404, 419-23 (3d Cir. 2002); Wenger v. Frank, 266 F.3d 218, 223-27 (3d Cir. 2001); Keller v. Larkins, 251 F.3d 408, 413-16 (3d Cir. 2001); Werts v. Vaughn, 228 F.3d 178, 192-95 (3d Cir. 2000); Lines v. Larkins, 208 F.3d 153, 159-69 (3d Cir. 2000); McCandless v. Vaughn, 172 F.3d 255, 260-63 (3d Cir. 1999); Sistrunk v. Vaughn, 96 F.3d 666, 673-75 (3d Cir. 1996).

[22]So far in 2005 alone, there have been over 47 decisions by District Courts in Pennsylvania denying relief on procedural bar grounds and denying a certificate of appealability. See Cullison v. Wolfe, 2005 WL 2644997, *4-*7 (E.D. Pa. Oct. 13, 2005); Johnson v. DiGuglielmo, 2005 WL 2585448, *10-*11 (E.D. Pa. Oct. 7, 2005); Johnson v. Kelcher, 2005 WL 2371994, *3-*4 (E.D. Pa.

from New Jersey and Delaware, the other states in the Third Circuit, the Third Circuit has denied relief, found claims procedurally barred, and *never found a state procedural default inadequate*.[23]

Sept. 26, 2005); Person v. Wynder, 2005 WL 2346117, *3 (E.D. Pa. Sept. 23, 2005); Miles v. DiGuglielmo, 2005 WL 2139952, *3 n.2 (E.D. Pa. Sept. 1, 2005); Saintville v. Colleran, 2005 WL 2106177, *4-*6 (M.D. Pa. Aug. 31, 2005); Guy v. Moore, 2005 WL 2104316, *3-*4 (E.D. Pa. Aug. 29, 2005); Turner v. DiGuglielmo, 2005 WL 2250692 (W.D. Pa. Aug. 29, 2005); Riley v. Lavan, 2005 WL 1995462 (E.D. Pa. Aug. 16, 2005); Faulcon v. Palakovich, 2005 WL 1958071, *3-*5 (E.D. Pa. Aug. 11, 2005); Bass v. Chesney, 2005 WL 1941661, *5-*6 (E.D. Pa. Aug. 10, 2005); English v. Vaughn, 2005 WL 1677967, *3-*5 (E.D. Pa. July 15, 2005); Turner v. Shannon, 2005 WL 1655881, *2-*3, *7-*8 (E.D. Pa. July 12, 2005); Imes v. Patrick, 2005 WL 1563351, *2-*4 (E.D. Pa. June 29, 2005); Wishnefsky v. Meyers, 2005 WL 1498502, *4-*5 (M.D. Pa. June 22, 2005); Schwartz v. Colleran, 2005 WL 1389235, *7-*11 (E.D. Pa. June 9, 2005); Green v. Rozum, 2005 WL 1279136 (E.D. Pa. May 25, 2005); Brodeur v. Patrick, 2005 WL 1126947, *4-*6 (E.D. Pa. May 11, 2005); Wyatt v. DiGuglielmo, 2005 WL 1114350, *7 (E.D. Pa. May 10, 2005); Adams v. Kyler, 2005 WL 1041191, *2 (E.D. Pa. May 2, 2005); Sims v. Patrick, 2005 WL 1025150, *7-*9 (E.D. Pa. April 29, 2005); Lloyd v. Shannon, 2005 WL 1138389, *3 (M.D. Pa. April 28, 2005); Harper v. Kyler, 2005 WL 950617, *6-*7 (E.D. Pa. April 22, 2005); Johnson v. Superintendent, 2005 WL 856888, *7 (E.D. Pa. April 13, 2005); Flecha v. Shannon, 2005 WL 851066, *2-*3 (E.D. Pa. April 12, 2005); Ocasio v. Varner, 2005 WL 856897, *2-*4 (E.D. Pa. April 12, 2005); Purnell v. Shannon, 2005 WL 825902 (E.D. Pa. April 7, 2005); Rorie v. Beard, 2005 WL 825917, *5-*6, *7 n.2 (E.D. Pa. April 7, 2005); Leyva v. Williams, 2005 WL 746042, *2-*5 (E.D. Pa. March 30, 2005); Clymer v. Combine, 2005 WL 711651, *3-*7 (E.D. Pa. March 29, 2005); Perez v. Sobina, 2005 WL 711653, *7-*8 (E.D. Pa. March 29, 2005); Rinaldi v. Gillis, 2005 WL 701710, *6-*9 (E.D. Pa. March 28, 2005); Bryant v. Folino, 2005 WL 664037, *2-*3 (E.D. Pa. March 21, 2005); Booker v. Folino, 2005 WL 638051, *5 (E.D. Pa. March 17, 2005); Sanchez v. Tennis, 2005 WL 645926, *2-*5 (E.D. Pa. March 17, 2005); Rienzi v. Gillis, 2005 WL 645925, *5 n.3 (E.D. Pa. March 16, 2005); D'Agostino v. Tennis, 2005 WL 568042, *2-*3 (E.D. Pa. March 8, 2005); Elam v. Gillis, 2005 WL 555383, *7-*8 (E.D. Pa. March 7, 2005); Tyler v. DiGuglielmo, 2005 WL 477997, *3-*7 (E.D. Pa. Feb. 28, 2005); Miles v. DiGuglielmo, 2005 WL 396603, *12-*13 nn.14-15 (E.D. Pa. Feb. 17, 2005); Robichaw v. Mechling, 2005 WL 331496, *5-*6 (E.D. Pa. Feb. 10, 2005); Smith v. Sobina, 2005 WL 281201, *5 (E.D. Pa. Feb. 4, 2005); Shackelford v. Stickman, 2005 WL 289935, *2-*3 (E.D. Pa. Feb. 4, 2005); Prunty v. Klem, 2005 WL 281182 (E.D. Pa. Feb. 3, 2005); Brown v. Sobina, 2005 WL 139086, *2-*4 (E.D. Pa. Jan. 21, 2005); Holiday v. Varner, 2005 WL 119572 (E.D. Pa. Jan. 19, 2005); Green v. Rozum, 2005 WL 83258 (E.D. Pa. Jan. 13, 2005).

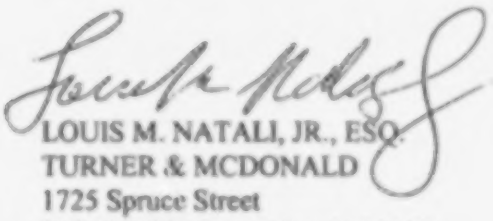
[23]The Third Circuit has denied relief in six of the seven Delaware capital habeas cases it has reviewed, see Gattis v. Snyder, 278 F.3d 222 (3d Cir. 2002); Weeks v. Snyder, 219 F.3d 245 (3d Cir. 2000); Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000); Bailey v. Delaware, 68 F.3d 736 (3d Cir. 1995) (en banc); Flamer v. Delaware, 68 F.3d 710 (3d Cir. 1995); Deputy v. Taylor, 19 F.3d 1485 (3d Cir. 1994), and in one of the two New Jersey capital cases it has reviewed, see Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003). In another Delaware capital case, the district court denied relief and neither the district court nor the Third Circuit allowed a certificate of appealability. See Steckel v. Carroll, 2004 WL 825302 (D. Del. Apr. 13, 2004). The Third Circuit has *never* found a

The Third Circuit and its District Courts simply do not take a "one-size-fits-all approach" to procedural default or the death penalty.

CONCLUSION

For the reasons stated above, certiorari should be denied.

Respectfully submitted,



LOUIS M. NATALI, JR., ESQ.
TURNER & MCDONALD
1725 Spruce Street
Philadelphia, Pennsylvania 19103
215-546-9700
Counsel for Respondent, Antuan Bronshtein

Dated: November 15, 2005

---

bar inadequate in capital cases from these states, and has repeatedly found claims procedurally barred, or approved the district court's procedural bar finding. See Gattis, 278 F.3d at 225, 228; Riley v. Taylor, 277 F.3d 261, 302-03 (3d Cir. 2001) (en banc); Bailey, 68 F.3d at 755, 756, 758; Deputy, 19 F.3d at 1489 n.5.

CERTIFICATE OF SERVICE

I, Louis M. Natali, Jr., Esquire, certify that on this 15th day of November, 2005, I have caused the foregoing brief in opposition to be served by FIRST CLASS MAIL on the following persons:

Mary Ann Killinger, Esquire
Office of the Montgomery County District Attorney
Montgomery County Courthouse
P.O. Box 311
Norristown, Pennsylvania 19404-0311

Thomas C. Dolgenos
Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, Pennsylvania 19102

Counsel for Petitioners

Louis M. Natali, Jr., Esquire

3

DEC 2 0 2005

No. 05-346

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; JOSEPH MAZURKIEWICZ, Superintendent of State Correctional Institution at Rockview; GERALD J. PAPPERT, Attorney General of Pennsylvania,

Petitioners,

v.

ANTUAN BRONSHTEIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

BRUCE L. CASTOR, JR.
(Counsel of Record)
District Attorney
Montgomery County
District Attorney's Office
Montgomery County Courthouse
Norristown, PA 19404
(610) 278-3104

PATRICIA E. COONAHAN
Captain, Appellate Division
MARY MACNEIL KILLINGER
Chief, Appellate Division
Montgomery County
District Attorney's Office

THOMAS W. DOLGENOS
Chief, Federal Litigation
LYNNE ABRAHAM
District Attorney
1421 Arch Street
Philadelphia, PA 19102

TABLE OF CONTENTS

ARGUMENT IN REPLY 1

CONCLUSION 10

TABLE OF AUTHORITIES

Federal Cases

Bradshaw v. Richey, ___ U.S. ___ (No. 05-101, 2005) 2

Caldwell v. Mississippi, 472 U.S. 320 (1985) 8

Granberry v. Greer, 481 U.S. 129 (1987) 4

Harris v. Reed, 489 U.S. 255 (1989).....8

Lambrix v. Singletary, 520 U.S. 518 (1997).....4

Lee v. Kemna, 534 U.S. 362 (2002) 2, 3

Osborne v. Ohio, 495 U.S. 103 (1990) 3

State Cases

Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998).....7

Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) 7

Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003).....6

Commonwealth v. Peterkin, 722 A.2d 638 (Pa. 1998) 7

State Statutes

42 Pa. C.S.A. § 9545(b) 7

ARGUMENT IN REPLY

In their Petition for Writ of *Certiorari*, petitioners explained that Pennsylvania's one-year collateral review deadline, set out in the state's Post Conviction Relief Act ("PCRA"), is a clear statutory mandate. It has been strictly applied, exactly as written, in both capital and non-capital cases since its effective date in 1996. The Third Circuit, therefore, made a fundamental mistake by declaring this statutory rule to be "inadequate" as a procedural bar.

In his response, Bronshtein avoids discussion of the PCRA deadline almost entirely. Instead, he concentrates on an unrelated doctrine – the Pennsylvania Supreme Court's now-abandoned practice of relaxing its *waiver* rules in capital cases. This "relaxed waiver," Bronshtein insists, made application of the PCRA deadline uncertain, and therefore inadequate. But Bronshtein does not contest a series of important points:

*The Pennsylvania Supreme Court has **never** relaxed the collateral review time-bar.* The entire foundation of Bronshtein's argument, and of the Third Circuit's inadequacy holding, is that the PCRA time-bar was unpredictable in capital cases, because the Pennsylvania Supreme Court might have "relaxed" the deadline for death-sentenced prisoners. But it has never happened. Bronshtein does not, and cannot, cite *even one case* where the Pennsylvania Supreme Court ever actually "relaxed" the PCRA time-bar – because there are no such cases. On the contrary, the state supreme court has firmly and repeatedly held that the deadline is strict and jurisdictional. *Petition* at 12 (citing cases). This rule was fully adequate as a procedural bar.

Bronshtein had actual knowledge of the PCRA deadline before he gave up his claims. Bronshtein had "fair notice" of the time-bar, because it is a clearly-worded statute.[1] But he also had actual knowledge of the rule. As described in the *Petition*, Bronshtein explicitly stated, on the record, that he was aware of the time limit. *Petition* at 14. He said this in state court, *before* he waived further review, *before* his timely first PCRA petition was dismissed at his request, *before* he filed his second, untimely petition, and *before* the time-bar was applied to him. Bronshtein does not contest the fact that he had actual knowledge of the time-bar – he does not even mention it. The question remains: how can a state prisoner not have fair notice of a procedural bar that he has explicitly acknowledged, in open court?

New procedural rules do not have to be judicially applied before they become "adequate." The Third Circuit held that the PCRA time-bar was uncertain in capital cases until it was actually applied by appellate judges, an approach that is fundamentally inconsistent with this Court's jurisprudence. See Lee v. Kemna, 534 U.S. 362, 382 n.13 (2002) ("[t]he adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar"). See also Bradshaw, ___ U.S. at ___, No. 05-101 (prisoners have "adequate notice" of statute's reasonable interpretation, even where there are no "fundamentally similar prior cases"). Bronshtein does not

---

[1] Just a few days ago, this Court reaffirmed the principle that state prisoners have fair notice of statutory requirements, even where the statute has not yet been applied to a similar fact pattern and there is some dispute about whether it *should* apply. Bradshaw v. Richey, ___ U.S. ___, No. 05-101 (Nov. 28, 2005) ("reasonable warning" of statute's meaning, rather than "fundamentally similar prior cases," constitutes "adequate notice").

contest this basic principle. It is difficult to imagine how this particular statute could have been any clearer.

The PCRA time-bar serves a legitimate state interest. This is an obvious point, but it is worth stressing. This Court has found "inadequate" state rules that served no legitimate purpose. Lee, 534 U.S. at 378, quoting Osborne v. Ohio, 495 U.S. 103, 124 (1990). But the PCRA deadline, like the federal habeas deadline, has a clear goal: it is designed to stop post-conviction delay. What Bronshtein did in state court – his year-long insistence on waiving further review, spurring a series of hearings and examinations, followed by a complete turn-around a few weeks later – is the kind of gamesmanship that the deadline is meant to stop.

The decision below has widened a split in the circuits concerning the adequacy of similar rules. In the *Petition*, the Commonwealth pointed out that several other circuits have reached starkly different conclusions about the adequacy of similar state rules. *Petition* at 25-29. Bronshtein does not even cite any of these cases, let alone try to reconcile them.

The arguments that Bronshtein *does* make are mostly irrelevant, and certainly incorrect:

1. The Third Circuit's "inadequacy" standard was incorrect. Bronshtein first insists that the Third Circuit used the correct standard in determining the "adequacy" of the state collateral review deadline, and he concludes that the only dispute here is how to apply that standard to a particular set of facts. *Response* at 22. On the contrary, the point here is that the Third Circuit did *not* apply the correct standard. Bronshtein had fair notice of deadline, and a reasonable opportunity to raise his claims – *that* is the proper test. See *Petition* at 16-19. See also Brief *Amicus Curiae* of the

Criminal Justice Legal Foundation in Support of the Petition for Writ of *Certiorari*, at 4-6.

In fact, Bronshtein does not even address the "fair notice/reasonable opportunity" test in his response, or explain why it should not apply to this case and other cases.

2. This Court should not defer to the opinion below. A large portion of Bronshtein's argument is devoted to the proposition that there is a mountain of Third Circuit precedent rejecting the PCRA time-bar as inadequate in death penalty cases, and this Court should defer to the Third Circuit's greater experience with local Pennsylvania practice. *Response* at 23-25. But this makes little sense. The Courts of Appeals do not have the final word on the meaning of state law; the states do. And where a federal question rests on an interpretation of state law, as "adequacy" often does, this Court regularly takes up the question. The authorities Bronshtein cites for this supposed rule of deference to the Circuits, *Response* at 23 & n.14, do not create any such "hands off" policy. In those cases, this Court either declined to consider a state procedural issue that the Circuit did not even address,[2] or chose to avoid wading into a dispute about an arcane bit of local practice that was not central to the appeal.[3] Neither of these situations exists here. The PCRA deadline, and the scope of "relaxed waiver," are not mysterious local practice; they are defined by statute, and by

---

[2] E.g., Lambrix v. Singletary, 520 U.S. 518, 525 (1997).

[3] E.g., Granberry v. Greer, 481 U.S. 129, 136 n.9 (1987) (declining to decide whether Illinois mandamus petition should be filed in lower state court, or state appellate court, when issue presented was whether federal court can raise exhaustion *sua sponte*).

the state supreme court. The Third Circuit squarely addressed the "adequacy" of the procedural bar in this case. Finally, this is not a tangential issue – this is the whole point of the *Petition*.

As for Bronshtein's list of lower federal court decisions supposedly holding the PCRA time-bar inadequate, it is both misleading and significant. The list is misleading, because the vast majority of these cases held *other state rules* to be inadequate – not the PCRA deadline. On the other hand, the list is significant, because it demonstrates the wide impact of the Third Circuit's mistaken view of "adequacy." For years now, the Third Circuit has been applying an unadorned "uncertainty" test to measure the adequacy of various state rules; in the process, the court has overlooked a number of plain procedural defaults. In Bronshtein's case, the Third Circuit's approach has reached its logical, but absurd, extreme: invalidation of a plainly-worded statutory deadline, merely because an exception *might* have been made to it (but was not). That the Court of Appeals regularly applies this same mistaken test to other rules is reason to grant *certiorari* review, rather than deny it.

3. The state courts do not agree that the PCRA time-bar is inadequate. Bronshtein boldly claims that "the inadequacy of the Pennsylvania Supreme Court's bar ruling in this case has even been recognized by Justices of the Supreme Court." *Response* at 24. This is patently false. No Pennsylvania Supreme Court justice has *ever* stated, or even suggested, that the collateral review deadline is, or was, inadequate in capital cases. One member of the Court, Justice Saylor, once opined in an un-joined concurrence that some rules of *waiver* (not the time limit) might be inadequate in capital cases; but this view was explicitly rejected by Justice Castille, no other member of the Court agreed with it, and in any event "adequacy" is a doctrine of federal law that

is properly defined by federal judges.[4] Furthermore, in a later case in which the Pennsylvania Supreme Court finally abandoned "relaxed waiver" altogether, Justice Saylor dissented (again by himself) from the majority's lengthy and definitive discussion of "relaxed waiver's" history and scope, demonstrating that this particular Justice's views concerning "relaxed waiver" have been rejected by other members of the state supreme court, and should not be accepted by this Court as authoritative. See Commonwealth v. Freeman, 827 A.2d 385, 417 (Pa. 2003) (Saylor, J., concurring and dissenting).

4. The Third Circuit's "date of default" analysis was incorrect. The court below held that the PCRA time-bar was uncertain in application on the date of Bronshtein's default, which it fixed on October 20, 1998, or one year after Bronshtein's judgment became final. 14a. Even if this date were correct, however, the PCRA deadline was still adequate, because Bronshtein had fair notice of the law by then – it was effective in 1996. In any event, as explained in the *Petition*, this "date of default" is wrong. *Petition* at 23-24. By incorrectly identifying the critical date, the Third Circuit was able to ignore additional evidence of the deadline's adequacy – namely, a Pennsylvania Supreme Court decision applying it

---

[4] The "adequacy" question consists of two parts: the scope and application of the state rule, which is the province of state lawmakers and/or state judges; and the "adequacy" of that rule, so defined, as a bar to federal claims. It is only that latter question that is answered by the federal courts. With respect to the PCRA time-bar, the Pennsylvania courts have spoken with one consistent voice – the deadline is always applied, in every case, and it amounts to a jurisdictional bar. The issue for the federal courts is whether that uniformly applied deadline is "adequate."

in a capital case. See Commonwealth v. Peterkin, 722 A.2d 638, 643 (Pa., Dec. 21, 1998).[5]

Bronshtein defends the Third Circuit's analysis, arguing that the federal courts have *no choice* but to fix the "date of default" on October 20, 1998, because that date was chosen by the state supreme court. *Response* at 25-26. But that is a misinterpretation of the state court's ruling. The Pennsylvania Supreme Court held that Bronshtein's second PCRA petition was untimely because it was not filed within one year of the judgment. This was merely an application of the PCRA statute, 42 Pa. C.S.A. § 9545(b); the Court did not purport to determine when Bronshtein actually chose to forego his claims, or when his actions made further state review impossible. Federal adequacy analysis is different: the issue ultimately turns on fairness, and whether the consequences of Bronshtein's actions were reasonably

---

[5] By moving the date of default forward, the Court of Appeals also did not have to confront Commonwealth v. Albrecht, 720 A.2d 693 (Pa. Nov. 23, 1998), in which the state supreme court announced it would no longer "relax" the rules of waiver in capital collateral appeals. While Bronshtein and the Third Circuit rely almost exclusively on Albrecht as the sudden change in state law that Bronshtein could not have been foreseen, however, that is again misleading. The only issue in Albrecht was whether rules of *waiver* would continue to be "relaxed" in capital appeals; the Albrecht Court did not mention the time-bar, and the Court has never suggested that application of the PCRA deadline was made possible by Albrecht. On the contrary, the state supreme court has clearly and repeatedly explained that the PCRA deadline is a jurisdictional requirement, which by its nature *could not* be subject to "relaxed waiver." See, e.g., Commonwealth v. Banks, 726 A.2d 374, 376 (Pa. 1999) (PCRA deadline is jurisdictional and "relaxed waiver" *could not* apply).

foreseeable when he gave up his claims, which he did on January 26, 1999. *That* is the critical date here.

The cases upon which Bronshtein relies for his "date of default" argument are simply irrelevant. In Harris v. Reed, 489 U.S. 255, 265 n.12 (1989), this Court stated that the state court must actually rely on a procedural bar in order for that bar to lead to a default in federal court. See also Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (same). But that is not the issue – no one disputes that that the PCRA time-bar was applied to Bronshtein by the Pennsylvania Supreme Court. The only issue here is whether that application was fair. In order to decide *that* question, the federal courts must decide whether Bronshtein had fair notice of the deadline when he voluntarily gave up his rights to further review – on January 26, 1999.

5. The Third Circuit did not focus on the specific procedural bar applied by the state courts. As explained in the *Petition*, the Third Circuit adopted a "one-size-fits-all" approach to procedural bars in Pennsylvania capital cases: because the "relaxed waiver" doctrine had been used to overcome *other* state procedural bars, the panel reasoned, then it must have rendered the PCRA deadline uncertain and inadequate, too. But the PCRA deadline has *never* been relaxed, and the Third Circuit did not sufficiently focus on the adequacy of *this* rule, as opposed to *other* rules.

Bronshtein attacks this argument by mischaracterizing it. The Third Circuit does not have a "one-size-fits-all" approach to death penalty cases, he insists, citing several cases where the Circuit actually rejected appeals by death-

sentenced prisoners.[6] But that is not the Commonwealth's argument. The point is not that the Third Circuit treats every death penalty case the same way, but that its default analysis treats every Pennsylvania death penalty *rule* as if they were all equally susceptible to "relaxed waiver." In fact, this particular rule – the PCRA deadline – was never relaxed at all. It follows that, even if "relaxed waiver" could have made other rules inadequate (a dubious proposition), it certainly did not make *this one* inadequate.

---

[6] Bronshtein attempts to portray the Third Circuit as even-handed in Pennsylvania death-penalty cases, but he does not tell the whole story. In fact, since the state's post-Furman death penalty statute became effective in the early 1980's, the courts have not permitted *any* executions in Pennsylvania capital cases where the prisoner did not wish to be executed.